Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-503

BILLY D. COOK, LOULA JUANITA MILTON ADAMS, MRS. W. P. WRIGHT, *Petitioners*

v.

ROGER W. HUDSON, JOHN BURT, JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER, N. F. HANSON, Board of Education, Calhoun County, Mississippi, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

Billy D. Cook, Loula Juanita Milton Adams, Mrs. W. P. Wright, *Petitioners*

v.

Roger W. Hudson, John Burt, James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, N. F. Hanson, Board of Education, Calhoun County, Mississippi, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 21, 1975.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.2d 744. (App. 2a) The denial of rehearing is not reported. (App. 1a) The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855. (App. 30a)

II.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 21, 1975. A timely petition for rehearing en banc was denied on July 3, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED

Whether, consistent with the First and Fourteenth Amendments, a public school board may terminate the employment of all teachers not sending their children to public schools.

IV.

CONSTITUTIONAL PROVISIONS AND REGULATION

United States Constitution—First Amendment:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution—14th Amendment:

Section 1. All persons born or naturalized in the the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Policy: Calhoun County Board of Education:

Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi will be required to attend the public schools of Calhoun County or said teacher will not be employed or reemployed.

V.

STATEMENT OF THE CASE[1]

In November of 1972, the public school board in Calhoun County, Mississippi verbally adopted the following policy:

> Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, will be required to attend the public schools of Calhoun County or said teacher will not be employed or reemployed. [App. 5a.]

At that time, petitioners represented over twenty years of teaching experience.[2] Refusing to comply

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[1] With the curtailment of a First Amendment right, a detailed statement is in order. Tinker v. Des Moines Community School Dist., 393 U.S. 503, 509; Pickering v. Board of Educ., 391 U.S. 563; Blackburn v. Alabama, 361 U.S. 199, 205 n.5 ("[W]e cannot escape the responsibility of scrutinizing the record.")

[2] Cook (8 years); Wright (8 years); Adams (4½ years).

with the policy, their contracts were not renewed after the expiration of the 1972-73 school year. Their response was a 1983 [3] suit in the Northern District of Mississippi seeking reinstatement and back pay. Evidence presented may be briefly summarized:

(1) *Petitioners*:—Petitioners have children enrolled in Calhoun Academy; a private, segregated facility in the county established in 1968.[4] It is undisputed that petitioners are competent (Record, vol. 1, at 5, 16, 169) and compatible with the school administration. (Record, vol. 1, at 69-70; 162-3) More importantly, there had been no complaints from students, parents, fellow faculty members, or the administration, relating to their children or questioning their commitment [5] or teaching ability. This status was maintained at all

[3] 42 U.S.C. § 1983 (1970). Jurisdiction was based on 28 U.S.C. § 1343(3) (1970). Named defendants included the principal, superintendent of the board of education, members of the board, and the board itself.

[4] Sponsored by the local chapter of the White Citizens' Counsel (states' rights; racial integrity). The current minimal impact of the facility is best demonstrated by present enrollment; the private academy has approximately 164 students while the public system serves over 3,368. *Compare* MISSISSIPPI DEPT. OF EDUC., NON-PUBLIC SCHOOLS 1974-5 at 2 (1975) *with* MISSISSIPPI DIV. OF ADMIN. & FIN., PUBLIC SCHOOL ENROLLMENT 1974-5 at 9 (1975). The county's situation is fairly representative of the current status of segregated academies not located in predominantly Black districts, *i.e.*, stabilized or decreasing enrollment. Note, *Segregation Academies & State Action*, 82 Y. L. J. 1436, 1443 (1973). These facts, of course, somewhat qualify this Court's finding in Norwood v. Harrison, 413 U.S. 455, 457, that: "Private schools in Mississippi have experienced a marked growth in recent years."

[5] The only evidence in the record reflecting some qualms concerning the public school system is a statement by petitioner Wright (on cross examination) that she was not "totally committed" to a desegregated school system. (Record, vol. 1, at 103)

times prior to adoption of the policy and in the period of remaining employment (Nov., 1972-June, 1973). As stipulated, the *sole* basis for termination was violation of the policy (Record, vol. 1, at 5, 16), and therefore not related to any subjective or objective reasons which the petitioners possessed at the time their choice was made.[6]

(2) *Scope of the Policy*:—The board's policy requires every teacher living in Calhoun County to send his or her children to the public schools in that county. Though not expressly limited, the school board president testified that the policy was adopted with only Calhoun Academy in mind. (Record, vol. 2, at 21-22; 31-32) Petitioners, however, could only be rehired upon recommendation of the principal,[7] Roger Hudson. His interpretation of the policy required literal enforcement, *i.e.*, no exceptions for children with hearing problems or for teachers wishing to send their children to a parochial school. (Record, vol. 1, at 17, 25-7, 40)

(3) *Reason for Adoption; Subsequent Justification*:—Prior to adoption of the policy the board noti-

[6] Considerable trial time was spent in an extensive inquiry into petitioners' motivations. Some reasons, such as calmer environment, smaller classes, religious training and location appear valid; others do not (not wanting son in same school; need for speech therapist). See Record, vol. 1, at 40-103. The trial judge found that "the dominant . . . reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system." App. 34a. Quite obviously, this applies to all teachers sending their children to any private school (segregated or not).

[7] "On or before April 1st of each year, the principal of each school shall recommend to the superintendent . . . the teachers to be employed . . . ." MISS. CODE ANN. § 37-9-17 (1973).

fied eight teachers having children enrolled at Calhoun Academy that their contracts would not be renewed. (Supp. App. at 51; Record, vol. 2, at 24) The board's attorney wrote the Department of Justice concerning the legality of this action. This letter noted that he had advised the board members that they were under an obligation "to do all affirmatively necessary to advance integration." With respect to the board's position:

> [They] also feel that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children. [Supp. App. at 51-52.]

An assistant attorney general responded. While mentioning potential "due process" and "First Amendment" issues, he concluded that such action was an appropriate step in converting to a "unitary school system in which racial discrimination would be eliminated root and branch." (Supp. App. at 61-62) Shortly after receipt, the board verbally agreed to the policy.

At trial, the board president noted that prior to passage the board was also concerned with "talk" about teachers with children in private school.[8] He further testified that school board members were concerned with frequent newspaper reports of private financial assistance given the academy. (Record, vol. 2, at 24-31)

[8] The record contains no evidence of specific complaints save those made by the "Simpson kids" to their parents. (Record, vol. 2, at 37) Identity of the teachers generating this reaction is unknown.

Two educational psychologists from the University of Mississippi also testified. The first, an assistant professor of guidance and educational psychology, reasoned that a teacher's decision to send his or her child to a private school evinced rejection which would be perceived by students and would act as a "negative social reinforcement"; "anything that detracts from a positive perception of [the] teacher *may* affect learning." (Record, vol. 1, at 121) (Emphasis added.) Reinforcement was described as:

> [A]n operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance has the *potential* for increasing or having an effect on learning. [Record, vol. 1, at 109. (Emphasis added.)]

The witness further felt that teachers who reject the public school system for their own children would have lower expectations for the children in public schools. Concluding that lower teacher expectations would result in lower student achievement, he found the policy "reasonable." (Record, vol. 1, at 111, 113)

On cross-examination he admitted, however, that he had never made studies of Mississippi schools; not talked to the teachers or students in the Calhoun County system; and, finally, had no first-hand knowledge of the situation in the county. (Record, vol. 1, at 123-24) The witness then expanded his analysis. In his opinion, all state teachers, university professors, and federal employees engaged in school-related activity are under an obligation to send their children to public schools. He also stated that the policy was

reasonable with respect to teachers sending their children to parochial schools. (Record, vol. 1, at 117-120)

The second witness (chairman of the Department of Guidance & Education) relied on an article from the monthly periodical *Psychology Today*.[9] Coupling this with a study he performed in another area of the state (concerning the utilization of positive reinforcements in the classroom), he offered his conclusions with respect to petitioners:

> Well, in my opinion, that would set up a system where other students would perceive *or could perceive* the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend. [Record, vol. 1, at 134. (Emphasis added.)]
>
> . . . .
>
> Well, *if* the student is perceiving the teacher as negative and that it is not a viable place for your own children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, *probably* would not achieve as well.
>
> Q. Would this be a positive effect or detrimental effect?
>
> A. Well, I would say it would be detrimental. *I wouldn't use "detrimental,"* I would probably use something like negative *or just a lack of positive reinforcement.* [Record, vol. 1, at 135. (Emphasis added.)]

[9] Rosenthal, *The Pygmalion Effect Lives*, Sept. 1973 PSYCHOLOGY TODAY 56 (Supp. App. at 36-41). The article reviews a number of studies exploring the effects of lowered teacher expectations on student achievement. It is not based on situations in Calhoun County, nor the issue presented in the present case. Rather, it focuses on consequences which flow from a teacher's perception of students as low achievers.

Finally, this dialogue:

> Q. [D]o you have an opinion as to what the expectation of a teacher would be who would send their child to a private school while teaching in a public school with respect to the expectation of children in the public school?
>
> A. *I wouldn't have an opinion for any particular teacher.* I would have to talk to the specific teacher on that. [Record, vol. 1, at 138. (Emphasis added.)]

On cross-examination his opinions with respect to sending children to parochial school (Record, vol. 1, at 146), and identical limitations with respect to university professors (Record, vol. 1, at 142), coincided with the other psychologist. The basis of his testimony, *i.e.*, no interviews with the teachers or children involved, was also admitted to be identical to that previously given. (Record, vol. 1, at 140-41, 149)

The District Court rejected all First Amendment, Due Process, and Equal Protection claims. This decision was affirmed 2-1; no opinion being agreed upon by the majority. A petition for rehearing en banc was denied 10-5 with Judge Clark writing:

> Respectfully, I insist that the panel decision is (1) contrary to Supreme Court precedent, and (2) an error of exceptional importance. My best effort having been expended in the panel dissent, a further attempt at explanation appears futile. [App. 2a.]

VI.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DECIDES A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. Preliminary Statement

The court of appeals premised its decision on a selective set of facts significantly limiting the constitutional issues fairly raised by the record. This portion of the petition sets forth reasons for granting the writ with the case in the factual posture assumed below. If certiorari is granted, however, it is the intention of petitioners to brief two additional issues not considered:

First, an explicit assumption was made that the action taken was a good faith attempt to eliminate the effects of a segregated school system "root and branch"; concededly a legitimate state interest. The record clearly shows, however, the presence of two "less weighty" factors[10] motivating board action: (1) a feeling that teachers should assume all outward indicia of dedication to the public school system (as set forth in the letter to the Department of Justice); and (2) a desire to curtail the competitive effect of the private academy by denying children of public school teachers access (as shown by the testimony of the board president). In the context of a denial of a fundamental constitutional right, neither factor serves a legitimate state interest. *Pickering* v. *Board of Educ.,* 391 U.S. 563 (absent adverse impact, criticism

[10] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (belief of board that pregnancy regulation should be passed because some children think "teacher may have swallowed a water melon.")

of school programs permissible); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (no legitimate state interest served in curtailing competition by secular or parochial schools). *Cf., San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1.

Second, the board policy, as written and subsequently interpreted by the person designated to carry it out, presents serious overbreadth issues. Although the trial court's action in narrowing the policy (to the facts presented by petitioners) was applauded by the circuit as having "the pragmatic virtue of facing up to the real issue," App. 5a, the approach conflicts with applicable decisions of this Court. Specifically, when a First Amendment exercise is at issue, a party whose activities might constitutionally be restricted benefits when the statute or regulation affecting him is overbroad. *Dombrowski* v. *Pfister,* 380 U.S. 479, 491.

B. Balancing Individual and State Interests

The majority opinions incorporate widely divergent approaches. Judge Coleman begins with *United Public Workers* v. *Mitchell,* 330 U.S. 75, and *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 458, as authority for dismissing the case "for want of a substantial federal question."[11] App. 9a. Concluding:

> I stand on what the Supreme Court said in [*Adler* v. *Board of Educ.,* 342 U.S. 485] . . . that per-

[11] Were this analysis adopted as a majority opinion, a separate basis for granting the writ would exist: does *Letter Carriers* overrule Pickering v. Board of Educ., 391 U.S. 563, an important question of federal law which has not been, but should be settled by this Court. *Letter Carriers,* of course, incorporates a *Pickering* analysis. *See* 413 U.S. at 564.

> sons employed or seeking employment in public schools have no right *to do so on their own terms,* that to maintain the integrity of public schools as part of an ordered society school authorities have the *right* and the *duty* to screen teachers in a relevant manner, not inconsistent with *basic* civil rights.[12]
>
> . . . I vote to affirm . . . . In so doing I find no necessity to put a "desegregation" gloss on the decision. [App. 12a.]

Judge Roney rejected this approach by noting that *Perry* v. *Sinderman,* 408 U.S. 593, precludes a school board from failing to rehire for an unconstitutional reason. Finding the successful operation of the public school system "seriously challenged" by Calhoun Academy, however, he concluded that "under the circumstances of promoting a unitary school system," the action taken by the Board was constitutional,[13] *albeit*

[12] This aspect of the opinion is in direct conflict with Keyishian v. Board of Regents, 385 U.S. 589, 605-06, where the Court stated: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. . . . It is too late in the day to doubt that [constitutional liberties] may be infringed by the denial of or placing of conditions on a benefit or privilege." *See also* Pickering v. Board of Educ., *supra* note 10 at 568; Perry v. Sinderman, 408 U.S. 593, 597.

[13] Again, were this a majority opinion, a separate ground for granting the writ exists. In limiting the analysis of the policy to the presumed intention (and effect) of furthering the unitary concept, the question is raised of the limits of Green v. County School Bd., 391 U.S. 430, an important question of federal law which has not been, but should be, settled by this Court.

Judge Roney's interpretation of *Green* also presents a conflict in circuits. Viewing petitioners as "symbols" of segregation (a conclusion implicit in Judge Roney's analysis), the Seventh Circuit holds that absent a factual showing of discriminatory effect, *i.e.,* denial of access to a public school's facilities, utilization of con-

not without expressed qualms, *i.e.,* "it would have been preferable for the school board to treat each plaintiff individually." App. 13a-14a.

By emphasizing the sensitivity of the state's interest, both opinions avoid the most critical facet of the case: the constitutional status of the penalized activity. Specifically, in making the personal, private[14] decision to place their children in an educational environment of their own choosing, petitioners exercised a right which, since *Pierce* v. *Society of Sisters,* 268 U.S. 510, has been considered "basic in the structure of our society." *Ginsberg* v. *New York,* 390 U.S. 629, 639. In its present constitutional posture: a fundamental First Amendment right. *Roe* v. *Wade,* 410 U.S. 133, 152-53; *Norwood* v. *Harrison,* 413 U.S. 455, 470 (a form of exercising freedom of association).

federate symbols could not be enjoined. Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970). The Fourth, in Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973), enjoined an administrator from defunding a student newspaper employing blatant racial editorial policies. The termination was pursuant to an assumed obligation to eliminate all vestiges of segregation "root and branch." The court, citing Healy v. James, 408 U.S. 169, held that, absent disruption, the state "may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent." 477 F.2d at 460. *Accord,* Smith v. St. Tammany Parish School Bd., 448 F.2d 414 (5th Cir. 1971) (injunction against display of confederate flag in principal's office; disruption through demonstrations). *But see* Augustus v. School Bd., 507 F.2d 152 (5th Cir. 1975) (utilization of name "Rebels" and confederate battle flag by students a matter to be dealt with initially by school board even though record shows past violence and racial tension).

[14] There is nothing in the record indicating that students or fellow faculty members were aware of petitioners' decision. The absence of such evidence, of course, precludes any *factual* finding with respect to the impact of petitioners' decision in the public schools.

If such choice were made by anyone other than a state employee, the conclusion would follow "that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Norwood* v. *Harrison, supra* at 461. What is involved, however, is the scope of permissible curtailment of otherwise constitutionally protected activity when the state acts in its role of employer. The Court's only pronouncement on the issue is *Pickering* v. *Board of Educ.*, 391 U.S. 563.

Pickering on review parallels the instant case: termination of a teacher engaging in a non-employment related exercise of a First Amendment right (letter to the editor) which the lower court held that the school board could "reasonably conclude" was "detrimental to the best interests of the schools." 391 U.S. at 567. This Court made an independent, detailed examination of the record [15] in order to determine the existence of actual interference with school operations.[16] Finding that—at best—Pickering's letter had been greeted with "massive apathy and total disbelief," 391 U.S. at 570, the conclusion followed that there was no factual showing that the First Amendment exercise had "in any way impeded [the] proper performance of his daily duties in the classroom or . . . interfered with the reg-

[15] The review spanned five facets of potential harm to the state interest in maintaining an adequate educational environment, only one of which is directly involved in the instant case: proper performance of daily duties in the classroom. See 391 U.S. at 569-73.

[16] The majority opinion rejects the "reasonable conclusion" standard along with the argument that activity such as Pickering's is per se detrimental to school operations. 391 U.S. at 571. To do otherwise would have equated the "board members own interests with that of the schools." *Id.*

ular operation of the schools generally." 391 U.S. at 572-73. Explicit in the Court's analysis is: (1) an awareness of the "enormous variety" of factual situations arising from the teacher-state relationship and the inappropriateness of laying down a general standard; 391 U.S. at 569, and (2) a determination that the extent of the state's ability to penalize a constitutional exercise entails a balancing of the interests of the teacher as a citizen and the state as employer. 391 U.S. at 568.[17]

The decision below ignores *Pickering*. Absent any direct, *factual* evidence that petitioners' decision with respect to their children had *any* impact (or indeed that any of the students were aware of the situation) the resultant alteration of the school environment fails to attain even the status of "massive apathy." [18] Focus must therefore be placed on the conclusiveness of the board's expert testimony and its interplay with the requirement of interference as postulated in *Pickering*.[19] This aspect of the case justifies the grant of certiorari.

[17] The district court recognized the applicability of the balancing test, App. 36a, but inexplicably refused to apply it. Rather, the court cited *Adler* and concluded that teachers cannot work on their own terms. This, and other aspects of the district court decision are discussed in Comment. *Cook* v. *Hudson: The State's Interest in Integration* vs. *the First Amendment Rights of the Public Schoolteacher*, 45 Miss. L.J. 953 (1974).

[18] "Massive ignorance" appears the better term.

[19] In the context of a First Amendment exercise, there are no decisions by this Court holding that expert testimony of the quality found in the instant record (generalized conclusions not based on empirical data gathered from actual experience with the subject matter) may be utilized to curtail the right asserted. Cf., Paris Adult Theatre I v. Slaton, 413 U.S. 49. As recently noted by the California Supreme Court: "Testimony which qualifies as admissible expert or opinion testimony . . . is, of course, perfectly

C. Equal Protection

Although the opinions written by the majority below do not discuss the issue, previous decisions of this Court clearly establish that classifications which impinge upon fundamental constitutional guarantees, must—under the Equal Protection Clause—be not merely rationally related to a valid purpose, but necessary for the achievement of a compelling state interest. *Shapiro* v. *Thompson,* 394 U.S. 618, 634. The board's policy fails if there is a "reasonable [way] to achieve [the goal] with a lesser burden on constitutionally protected activity." *Dunn* v. *Blumstein,* 405 U.S. 330, 343.

The policy deprives all teachers sending their children to the private school of gainful employment on the basis of status, *i.e.,* all teachers within the tainted class now suffer the conclusive presumption of lack of dedication and/or adverse classroom performance. In order to demonstrate that less restrictive means are not available, the state presumably must show that all teachers, through the *singular* act of sending their children to a private, segregated school, are demonstrably incapacitated from maintaining their achieved level of teaching, either because: (a) a significant number of students will perceive a "lack of dedication" and learn less; or (b) minority students will

good evidence. However, *where such testimony is not based upon actual* experience, it has limited utility in justifying a restriction of freedom of expression." Los Angeles Teachers Union v. Los Angeles Bd. of Educ., 71 Cal.2d 551, 455 P.2d 827, 835 n.13, 78 Cal. Rptr. 723 (1960). (Emphasis added.) This court now accepts such testimony to show the reasonableness of a regulation; but not as proof that the public gain to be derived from limiting constitutional exercises outweighs resultant impairment of freedom of expression. *Id.*

perceive the teacher as a "racist" and continue to suffer the adverse effects of a segregated school system.[20] Failing this and absent behavior on the campus or in the classroom establishing a nexus with these conclusions, the only other approach would be a showing that, *in fact,* students will seek out knowledge of the personal and private lives of the teachers and, armed with this knowledge, suffer consequent educational disabilities.

In the complete absence of such proof[21] the policy must fall. Reasonable alternatives are available to

[20] Again, an unanswered question is the conclusiveness to be afforded the expert testimony. Also lurking is the suspicion (implicit in Judge Roney's opinion) that all teachers sending their children to a private school do so for racial reasons. No such evidence exists in the present record. Additionally, any such approach brings into play the denial of a right or privilege solely because of association with an unpopular organization. But, "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from [public employment]." Keyishian v. Board of Regents, 385 U.S. 589, 606. *Cf.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir.), *petitions for cert. filed,* 44 U.S. L.W. 3098. (U.S. Aug. 12, 1975) (Nos. 75-62; 75-66; 75-278).

[21] Some research in the area tends to suggest that empirically-sound data supporting the state's position cannot be produced. Kenneth Clark concludes: "Although many people continue to believe that teachers have a direct influence on the development of racial attitudes in children, this view is not supported by any substantial body of evidence." K. Clark, PREJUDICE AND YOUR CHILD 31 (2d ed. 1963).

More recently, Christopher Jencks concluded that there is strong evidence that regardless of attitudes and abilities, a teacher has a *de minimus* effect on pupils: "Our research suggests, however, that the character of a school's output depends largely on a single input, namely the characteristics of the entering children. Everything else—the school budget, its policies, the characteristics of the teachers—is either secondary or completely irrelevant." C. Jencks, INEQUALITY 256 (1972).

weed from the school environment those—who through the act of sending their child to a private school—*actually* curtail their ability to teach in a unitary system. These include: utilization of faculty-student evaluations; evaluation of achievement levels of students in petitioners' classes before and after the constitutional exercise; and/or comparing student performance in classes taught by other teachers (outside the tainted class). By not considering the Equal Protection aspects of the case,[22] the lower court decision again conflicts with decisions of this Court; justifying the grant of certiorari.

D. Due Process

In *Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632, the Court dealt with various regulations requiring teachers to take maternity leave without pay at a predetermined point in the gestation period. The case presented a clear conflict between: (1) the "fundamental character of matters of marriage and family life"; 414 U.S. at 639, and (2) the equally compelling state interest in keeping physically unfit teachers out of the classroom. 414 U.S. at 643.

While noting that "at least some" teachers become physically disabled from effectively performing their

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[22] Presuming that there is room to argue that the board policy only indirectly infringes a protected right or that a fundamental right is not involved (per Judge Coleman and the trial judge) there is support for the proposition that the classification cannot withstand even minimal scrutiny. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (Powell J., concurring). This being true, it stands no chance if intermediate scrutiny is applied. Reed v. Reed, 404 U.S. 71.

duties within the time frame contemplated by the regulations, the Court concluded:

> The mandatory termination provisions . . . surely operate to insulate the classroom from the presence of *potentially* incapacitated pregnant teachers. But the question is whether the rules sweep too broadly . . . . That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. [414 U.S. at 644. (Emphasis added.)]

A strong, legitimate state interest exists to eliminate teachers whose out-of-school activities actually produce an adverse impact on their job performance. Balanced against this, is the teacher's right to exercise (without direct interference from the state) a family choice to send his child to a school of his own choosing. Potentially within the defined class are some teachers whose constitutional exercise may impede their classroom performance. But in establishing an irrebuttable presumption that all teachers falling within the class impinge the recognized state interest, the policy transgresses the clear holding of *LaFleur, i.e.,* absent a procedure for "individualized determinations," the policy fails to meet due process requirements. *Accord, Stanley* v. *Illinois,* 405 U.S. 645 (irrebuttable presumption that all unmarried

fathers are incompetent to raise their children); *Vlandis* v. *Kline,* 412 U.S. 441 (irrebuttable presumption as applied to residency). The opinions again being in conflict with decisions of this Court; the grant of certiorari is justified.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

In *Pickering,* failure of the state to prove sufficient disruption to establish as a *fact* that employment was more than "tangentially and insubstantially involved," 391 U.S. at 574, led to the granting of full constitutional protection for the right exercised. In this context, no reason existed to apply the test as announced; the balancing of interests. Left unanswered:

(1) The degree of "interference" necessary to counterbalance the exercise of an otherwise protected constitutional right; or

(2) How the factors relating to interference are to be weighed, combined or measured against the interference standard.

After seven years, *Pickering* remains the sole authority for determining the scope of constitutionally protected activity for teachers. In the interim, this Court established and refined the scope of constitutional protection afforded students first enunciated in *Tinker* v. *Des Moines Independent School Dist.,* 393 U.S. 503. Without citation to *Pickering,* the Court prefaced its constitutional analysis with the statement:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. [393 U.S. at 506.]

And concluded in the style of *Pickering:*

> As we have discussed, the record does not demonstrate any *facts* which might reasonably have led school authorities to forecast *substantial disruption of or material interference with school activities,* and no disturbances or disorders on the school premises in fact occurred. [393 U.S. at 514. (Emphasis added.)]

In *Healy* v. *James,* 408 U.S. 169 (unconstitutional exclusion from campus of SDS chapter), the Court again rejected curtailment of First Amendment activities on the basis of "undifferentiated fear," concluding that in all First Amendment cases a "heavy burden" of proof is placed on school administrators. 408 U.S. at 184. Again, and without citation to *Pickering,*[23] careful review of the record found no "material and substantial" disruption sufficient to curtail First Amendment activity.

If it were clear that *Tinker* and *Healy*[24] refined *Pickering's* broad analysis, the opinions below would —*again*—be in conflict with applicable precedent. *Pickering* dealt with past conduct;[25] *Tinker* and *James*

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[23] Cited with approval, however, were two other teacher cases. *Keyishian* for the proposition that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government" is an impermissible basis upon which to deny First Amendment rights; Shelton v. Tucker, 364 U.S. 479, for the need for "vigilant protection" of constitutional freedoms in American schools.

[24] *See also* Papish v. Board of Curators, 410 U.S. 667 (*Tinker* analysis applied to student newspaper).

[25] The school board in *Pickering* did allege that the letter "would be disruptive of faculty discipline" and would cause dissension in the school and community. 391 U.S. at 567. This Court, however, focused on the allegation of past harm; the approach being justified by the fact that the board was attempting to dismiss on this basis.

with potential interference with school operations. Sequentially, the instant case fits the latter mold. Termination was effectuated solely on the assumption that the attendance of public school teachers' children at a private academy would, in the future, adversely affect the learning environment of the public school system.[26] Termination was summary and without further inquiry even though there was ample opportunity prior to implementation of the policy, as well as in the interim period predating nonrenewal (the six month period remaining on outstanding contracts), to evaluate the impact of each teacher in order to determine any ascertainable deleterious effect on the school environment. The *only evidence* produced, however, was in the form of testimony couched in general terms, not directed to petitioners or the students involved, and qualified by such terms as "potential," "may," "could," "if," and "probably." Most damning is the conclusion that utilization of the word "detrimental" was erroneous; the applicable definitional phrase being "just a lack of positive reinforcement." As would be expected from the nature of the subject matter, the expert testimony is also flatly contradicted by some national studies on the issue.[27]

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[26] Indeed, the board policy contemplated as much since a teacher removing his or her child from the private school was, ipso facto, deemed sufficiently "cleansed" of the taint to continue teaching in the public school. Query the "adverse impact" of a teacher who once sent her children to a private school (which is exactly the posture assumed by those teachers bending to the board's policy).

[27] The *Coleman Report* indicates that there is no significant correlation between perceived teacher attitudes toward integration and the academic achievement of Southern Blacks. 2 COLEMAN REPORT, OFFICE OF EDUC., UNITED STATES DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). (Supplemental index). *See* Dyer, *School Factors & Equal Educational Opportunity*, 38 HARV., EDUC. REV. 38, 39 (1968) (table 3a). A more recent study concludes: "There is no evidence that school reform can substantially reduce the extent of cognitive inequality, as measured by . . . tests scores or educational attainment." C. Jencks, INEQUALITY 8 (1972). Earlier opinions to the contrary may be found in Davidson & Land, *Children's Perception of Their Teachers' Feelings Toward Them Related To Self-Perception, School Achievement & Behavior*, 29 J. EXPERIMENTAL EDUC. 107, 112 (1960); S. Koslin, B. Koslin & R. Paragament, *Efficacy of School Integration Policies in Reducing Racial Polarization*, Sept. 1972 at 14 (paper presented at the American Psychological Association, Honolulu, Hawaii).

This evidence obviously fails to meet *Tinker* requirements; it shows a pall of "undifferentiated fear" instead of *specific facts* indicating material and substantial disruption as the sole justification for the policy. After seven years of litigation under *Pickering,* however, the lower courts have reached widely variant results on the *Tinker-Pickering* interplay[28] which, as would be expected after this period of time, produces a clear conflict between circuits and within the circuits themselves.

In *Keckeisen* v. *Independent School Dist.,* 509 F.2d 1062 (8th Cir. 1975), *petition for cert. filed,* 44 U.S. L.W. 3045 (U.S. July 22, 1975) (No. 74-1503), the Eighth Circuit upheld a regulation prohibiting marri-

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[28] Both *Pickering* and *Tinker* are grounded in the principle that the state cannot deny constitutional rights through its control of the school system. Both decisions envision the same basis for valid administrative action: interference with school operations. *Pickering,* however, describes guidelines for analyzing the conflicting interests noting situations which *might have* led to a different result if they constituted sufficient interference. The problem is that the "if" was not made sufficiently clear. Thus, under *Pickering,* the possibility arises for courts to find a scintilla of, for instance, "disharmony", and hold for the state. Read with *Tinker,* however, the test of "substantial interference" would not produce such a result.

ages between administrators and teachers. In the absence of any facts showing that the marriage in question *substantially interfered* with one or more of the interests outlined in *Pickering, e.g.,* faculty harmony, the court, utilizing a per se approach, concluded: "[t]he mere existence of the husband-wife/administrator-teacher situation is bound to have a deleterious effect on the morale of the faculty." 509 F.2d at 1066. The failure to couple *Tinker* with *Pickering* is, of course, identical to the technique utilized by the trial judge and one member of the panel below.[29]

The conflicting approach is best demonstrated by the Second Circuit's decision in *James* v. *Board of Educ.,* 461 F.2d 566 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972).[30] At issue was the dismissal of a teacher for wearing an armband. Rejecting as a basic proposition that students' rights (under *Tinker*) were greater than teachers' rights (under *Pickering*) the court concluded that mere fear of disturbance could not justify

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[29] In a somewhat similar manner, the same Circuit in Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974), upheld the dismissal of a teacher whose speech was characterized as a "thinly veiled exhortation to violence." This decision affirmed the district court conclusion that proof of actual disruption was not necessary: "[P]otentially disruptive conduct is sufficient to remove the conduct from protected freedom of expression . . . ." 352 F. Supp., 613, 621 (E.D. Mo. 1972). The Fifth Circuit has utilized an identical approach. *See* Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir., 1972) (speeches to students utilizing profane language, etc.).

[30] *Accord,* Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973) (absent factual showing of material and substantial disruption, silent refusal by teacher to salute flag not grounds for dismissal).

the restriction and that conclusive evidence was necessary, to-wit:

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based on reasonable inferences *flowing from concrete facts and not abstractions,* that the interests of discipline or sound education are *materially and substantially jeopardized* . . . . [461 F.2d at 571. (Emphasis added.)]

On remand, the district court heard evidence from numerous experts testifying for the Board concerning potential disruption. Commenting on this testimony, the court noted (as in the instant case) that they knew nothing about the students or teacher involved, but had, in fact, derived their information about the armband incident from newspapers and discussion with counsel. 385 F.Supp. 209, 213-14 (N.D.N.Y. 1974). Alluding to this testimony and similar testimony by administrators that the teacher's act "might" lead to disruption, the Court found that classes had continued at a "serene pace," and concluded:

> [W]hat is essential for the defendants to carry their burden of proof is some sort of showing of *actual* educational or disciplinary disruption. The defendants have not offered any such proof. Testimony about some vague internal disruptions [*similar to testimony concerning the students in Calhoun County*] or alleged acts of "poor pedagogy" will not suffice. "[*I*]*n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.*" [385 F.Supp. at 216.]

The approach utilized by the Second Circuit of requiring, under *Tinker,* a factual showing of material

and substantial interference has been utilized by the Tenth,[31] Seventh,[32] Sixth,[33] Fourth,[34] and, as pointed out by the dissent below, in previous decisions of the Fifth.[35] The result is perhaps best described as "judi-

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[31] Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (statements at faculty meeting, must show material and substantial interference; First Amendment right outweighs the promotion of efficiency and harmony). *Accord*, Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974) (substantial "disharmony" not shown by personality preferences of college president).

[32] Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488, 492 (7th Cir. 1972) (teacher's speech may be regulated "only if a public entity can show that its functions are being substantially impeded by the employee's statements.")

[33] Whitsell v. Southeast Local School Dist., 484 F.2d 1222 (6th Cir. 1973) (support of unauthorized demonstration in gym substantially impeded school operations).

[34] Acanfora v. Bd. of Educ., 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (no substantial impairment of teaching capacity due to public interviews concerning homosexual beliefs; dismissal based on other grounds).

[35] In Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971), the court gave what it believed to be a correct reading of *Pickering* and *Tinker:* "[T]he State [has] the burden of justifying its action by showing that the complainant's activities "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Accord*, Smith v. United States, 502 F.2d 512 (5th Cir. 1974) (dismissal of psychologist upheld where it was "clearly demonstrated" that the wearing of a peace pin "substantially" interfered with treatment of patients in a VA hospital.)

The eighth circuit has its own internal conflict. In Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973), the district court refused to uphold the dismissal of a female teacher with intermittent nocturnal visitors where there was no showing that this activity interfered with the school's work; "undifferentiated fear or apprehension . . . is not enough." 346 F. Supp. at 401. The circuit affirmed, concluding that she had not

cial picking and choosing." Dependent upon the subjective approach taken by individual three-judge panels, *Tinker* may or may not be coupled with *Pickering* in order to give substantive protection to teachers. As recently analyzed:

> In light of the confusion surrounding the issue [scope of *Pickering*] it may well be concluded that the Court's next contribution to the development of the First Amendment rights of teachers should be in the form of clarifying the rules it has already established. [Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of Pickering and Tinker,* 8 GA. L. REV. 900, 918 (1974).]
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> The public employee and school cases since *Pickering* do not, with any degree of consistency, adequately formulate the degree of interference in the goals and operations of public agencies that will be tolerated in the name of first amendment exercise. What is needed is some intelligible expression of the weight to be given to the First Amendment interest in public employee cases. [Comment, *Cook* v. *Hudson, The State's Interest in Integration* vs. *The First Amendment Rights of the Public Schoolteacher,* 45 MISS. L.J. 953, 985 (1974).]

The teachers and school boards of this country deserve more predictable parameters within which each can function. The existing conflict in and between circuits justifies the grant of certiorari.

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been "shown incapable of maintaining discipline in her classes because of any inferences of impropriety drawn by her students or their parents." 476 F.2d at 378. *Accord*, Gieringer v. Center School Dist., 477 F.2d 1164 (8th Cir.), *cert. den.*, 414 U.S. 832 (1973) (no material and substantial disruption arising from speech made at a teacher's meeting).

VII.

CONCLUSION

The decision below sets the constitutional calendar back twenty-five years when communism (not racism) was *the* challenge to America. Comment, *The "Little Red Schoolhouse" and the Communists: New York State Struggles With the Problem of Educating in a Free Society*, 35 CORN. L.Q. 824, 826 (1950).[36] In its best light, it has all the characteristics of "just one more" (for the good of the cause, of course) in the name of integration. This "one more," however, sows the seeds of destruction for individual liberties. It conveys the message to thousands of school board members that the label "integration," like a magic talisman, may be utilized to justify the curtailment of any constitutional exercise by teachers under their control; regardless of the presence or absence of a legitimate state educational goal. In this sense it resembles a lower-court *Gobitis*[37], with the distinct potential of returning the American teacher to the serf-master relationship which has been the posture historically favored by local school boards.[38] Beale, A HISTORY OF

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[36] The trial judge and the Fifth Circuit did not "inadvertently" drop the constitutional ball. *See* Andrews v. Drew Municipal School Dist., 507 F.2d 611 (5th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3044 (U.S. July 22, 1975) (No. 74-1318) (affirming District Judge Keady's decision striking down a school board regulation prohibiting the employment of teachers having illegitimate children).

[37] Minersville School Dist. v. Gobitis, 310 U.S. 586.

[38] Exercise of the *specific power* of terminating teachers due to enrollment of their children in a private school is now statutorily prohibited in Mississippi. Chapter 459, Laws of 1974. Having no retroactive effect, the Fifth Circuit found no need to determine the constitutionality of this measure. App. 5a n. 3. The back-pay claim of petitioners obviously precludes any suggestion of mootness.

FREEDOM OF TEACHING IN AMERICAN SCHOOLS (1941). No matter how viewed, the integrated public school system of Calhoun County, Mississippi has rejected the services of three capable, individualistic, experienced teachers. The stamp of judicial approval: a decision in conflict with precedent of this Court and with decisions of other courts of appeal. The writ must issue.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-1038.

BILLY D. COOK, et al., *Plaintiffs-Appellants,*

v.

ROBERT W. HUDSON, etc., et al., *Defendants-Appellees.*

July 3, 1975.

Appeal from the United States District Court for the Northern District of Mississippi; 365 F.Supp. 855.

On Petition for Rehearing and Petition for Rehearing En Banc

(Opinion April 21, 1975, 5 Cir., 1975, 511 F.2d 744)

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

CLARK, Circuit Judge, with whom Circuit Judges THORNBERRY, AINSWORTH, SIMPSON and GEE, join (dissenting).

When it appeared my writing would express the views of the panel, particular care was taken to explicate and

document what was said because it seemed absolutely necessary to cogently reinstate the core rights trampled by the school district's arbitrary edict of forced conformity in a citizen's private life. That endeavor failed to muster a concurrence. Now, the full Court, albeit by the narrowest margin possible, has declined to rehear the cause en banc.

Respectfully, I insist that the panel decision is (1) contrary to Supreme Court precedent, and (2) an error of exceptional importance. My best effort having been expended in the panel dissent, a further attempt at explanation appears futile. For the reasons previously stated, I dissent from the court's denial of rehearing en banc.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-1038.

BILLY D. COOK, et al., *Plaintiffs-Appellants,*

v.

ROBERT W. HUDSON, etc., et al., *Defendants-Appellees.*

April 21, 1975.

* * * * * * * * * *

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Appellants are three school teachers formerly employed in the Calhoun County, Mississippi public school system. Each was refused reemployment for the 1973-74 school year by the Calhoun County Board of Education pursuant to an unwritten board policy that prohibited the hiring of any teacher whose own children did not attend the public schools. At the time the hiring decision was made, appellants' children were enrolled in the Calhoun Academy, an all-white, secular private school located in Calhoun County.

Pursuant to the policy, defendant Hudson, the principal of the Attendance Center at which plaintiffs taught, did not recommend plaintiffs for renewed teaching contracts for the 1973-74 school year, a prerequisite to reemployment under Mississippi law.[1] The court found that "[t]he sole reason for refusal [to recommend] was that the plaintiffs, otherwise qualified to continue their teaching duties, stated that they could not comply with the Board's policy." Shortly before the opening of the 1973-74 school year, plaintiffs brought this action for reinstatement, back pay and monetary damages, claiming that imposition of the Board's policy violated their First Amendment right to freedom of association and Fourteenth Amendment rights to due process and equal protection. The district court construed the policy to apply only to teachers with children enrolled in the segregated Academy and upheld it as a justified part of the Board's effort 'to eliminate racial discrimination and remove its pervasive influence from the county's public schools." Cook v. Hudson, 365 F.Supp. 855 (N.D. Miss. 1973).

I.

By order dated August 9, 1968, the district court instructed the Calhoun County Board of Education to begin the transition from a dual to a unitary school system. In addition to establishing a timetable for desegregating each grade, the court's order set out guidelines to be used by the school board in making faculty employment decisions during the transition period and thereafter. These guidelines prescribed remedial measures to correct the prior practice of faculty segregation. The court further enjoined the Board to take affirmative steps to eliminate racial discrimination from the public schools and to bring

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[1] Miss. Code Ann. Section 37-9-17 (1972). Mississippi does not provide tenure for public school teachers. *See* Jennings v. Meridan Municipal Separate School Dist., 337 F.Supp. 567 (S.D. Miss. 1971), aff'd, 453 F.2d 413 (5th Cir. 1971).

about a unitary school system within the county. The timetable called for full desegregation of the school system by the 1970-71 school year; no one has suggested that this deadline was not met.

On a factual basis more fully developed in its opinion cited above, the district court found that "Calhoun Academy is a racially discriminatory institution formed in the wake of public school desegregation to provide a haven for segregated education" and that "the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system." The court also found that prior to the establishment of Calhoun Academy no private school, either religious or secular, had ever existed in the county, and none except the Academy existed at the time the policy was promulgated.

When the Board decided on the challenged policy in November 1972, eight public school teachers had children enrolled in Calhoun Academy. Prompted by the concern that a proper accommodation to the court's desegregation order required a faculty "totally committed to a desegregated school system", and encouraged by a Justice Department letter seemingly approving its proposed action,[2] the Board verbally agreed to this policy:

[2] The letter, signed by an attorney in the Education Section on behalf of an Assistant Attorney General, read in pertinent part as follows:

> Although the Department of Justice is authorized by law to render legal opinions only to the President and the heads of the executive departments, we also have the responsibility to enforce the court orders in this case. Those orders would certainly not preclude the school board from taking the action described in your letter. Indeed, as your letter correctly notes, the court, in its ruling from the bench on August 7, 1968, made several references to the board's obligations to take positive and affirmative steps." As was pointed out by Chief Justice Berger [sic] in McDaniel v. Baressi, 402 U.S. 39, 41 [91 S.Ct. 1287, 28 L.Ed.2d 582] (1972), "school boards that operated dual school systems are charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." See also, Green v. County School Board, 391 U.S. 430, 437-438 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968).
>
> The comments made above do not purport to answer any "due process" or "First Amendment" issues which may be raised in the matter. We appreciate your interest in writing this Department.

> Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, will be required to attend the public schools of Calhoun County or said teacher will not be employed or reemployed.

Board members testified that although more broadly stated, the policy was fashioned with only Calhoun Academy in mind. In evaluating plaintiffs' constitutional claims, the court below limited its consideration to the policy terms "intended by the board and applied to the plaintiffs", and expressly declined to reach any potential question that might be raised by application of the policy to a teacher whose children attended a racially nondiscriminatory school. 365 F.Supp. at 859-60. The district court's approach of reviewing the policy narrowly as it was intended and applied, rather than broadly as it was adopted, has the pragmatic virtue of facing up to the real issue between the parties and producing a resolution of that issue on its merits now.[3]

[3] In this connection, we note that subsequent to the adoption of this policy and before these teachers were reemployed the State of Mississippi enacted a statute that prohibits school board regulations denying employment or reemployment on the ground of nonenrollment of an eligible child in that public school system. Chapter 459, Laws of 1974. Since none have suggested that the statute should be given retroactive effect, the validity of the statute is not before us.

Although the president of the school board testified that patronage of the Academy by public school teachers had been a source of controversy in the community, the keystone to defendants' justification of the policy (and the district court's approval) came from the testimony of two experts in the field of educational psychology. Both were of the opinion "that the challenged policy was significantly related to a teacher's effectiveness and job performance [because] students in desegregated classes are likely to perceive rejection, and experience a sense of inferiority from a teacher whose own children attend a nearby racially segregated school, and [such students will] be inclined to perform at a lower educational level". 365 F.Supp. at 860. Neither expert had evaluated plaintiffs individually. One had been director of a three-year project the aim of which was "to increase the interaction between the school and the community and the student and the teacher in public schools in Mississippi". His investigation had included schools in Calhoun County, although not the Calhoun City Attendance Center at which plaintiffs taught. Both experts agreed that the Board policy was "reasonable", based on psychological principles of "negative reinforcement" and "teacher expectation". One of them explained:

> A. Okay. The kind of thing that operates in a classroom is that a major variable in learning is how a teacher relates to a student. There is ample indication from both research, my own and others, and just observation on my part that a teacher who is perceived by students as rejecting the public school system will have a difficult time, for example, reinforcing the learning that would go on in the classroom. It would be a perception on the part of students of a difference from the students, and I think this would be particularly true with the black students.
>
> Q. What would be the relationship of this rejection and perception to academic achievement?
>
> A. The major thing is that a teacher is the major—or a major reinforcer of learning. And so that if there

> is a discrepancy in the way that a student—or let's say if there is a negative perception on the part of the student of the teacher, this detracts from the teacher's ability to reinforce learning.
>
> Q. Now, by reinforcement, what are you speaking of in terms of this reinforcement?
>
> A. It's an operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance has the potential for increasing or having a positive effect on learning.
>
> Q. Is this what—
>
> A. That's basically what reinforcement is.
>
> Q. Is this what educational psychologists would refer to as positive or negative social reinforcement?
>
> A. Right.
>
> Q. And what would be the effect of a negative social reinforcement?
>
> A. The negative social reinforcement is shown in situations where the possibility exists for a teacher not having the potential or the possibility as a functional teacher to reinforce what goes on in an appropriate way in the classroom.
>
> Q. Doctor Eicke, would a student perceive a teacher who sent their own children to a private school—a public school student, would this be perceived as a negative social reinforcement?
>
> A. I think it would.
>
> Q. Doctor Eicke, what do psychologists mean when they refer to teacher expectations?
>
> A. Teacher expectation is an area that has been studied in educational psychology dealing with a phenomenon in which what is expected of students is what they tend to do. And my contention would be that if a teacher expected less from students that the students would tend to perform at a lower level; and conversely, if the teacher expected more, the students would tend to perform better. This need not be a

> conscious kind of thing. In fact, it usually isn't. And I would think that a teacher that rejects the public school system as acceptable for [the teacher's] own children would set lower expectations [for the public school students] that [the teacher] would then come in contact with.

He added that "[a]nything that detracts from a positive perception of [the] teacher may affect learning." The other expert repeated and further explained similar opinions.

The district court found in this evidence a sufficient "rational relation" between the challenged policy and the goal of public school desegregation to answer plaintiffs' equal protection objection. However, while apparently conceding that the Board's policy infringed plaintiffs' First Amendment rights, the court noted that those rights "may not be considered in isolation", that they "must be applied in the light of the special circumstances of the environment of the particular case",[4] and that "where the exercise of First Amendment rights impairs the teacher's effectiveness, or conflicts with the performance of her job, the school board may lawfully refuse to rehire the teacher". After quoting from the Supreme Court's opinion in Adler v. Board of Education,[5] the court concluded:

> It necessarily follows that if the board's policy is a reasonable and constitutional regulation, plaintiffs may not complain of the consequence of not being rehired as public school teachers for having exercised their right to send their children to a private school.

The court evidently implied a finding that the policy was constitutional within its determination that the rational relation test had been met.

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[4] Quoting Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972).

[5] 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952).

The Per Curiam opinion to this point was prepared by Judge CLARK. All members of the Panel concur in it. After extensive conference and individual judicial study of this obviously difficult case, our inability to agree on a unanimous opinion stems from our disagreement as to (1) whether the Judgment of the District Court should be affirmed and (2) the reasons for our individual conclusions. From this point forward the members of the Panel will state their views separately, with the result that the Judgment of the District Court will be affirmed.

SEPARATE VIEWS OF CIRCUIT JUDGE COLEMAN

With deference to the views of my Brothers, I vote to affirm the judgment of the District Court, but for reasons different to those there assigned. Under the authority of United Public Workers v. Mitchell and United States Civil Service Commission v. National Association of Letter Carriers, hereinafter cited, I would have dismissed the case for failure to raise a substantial constitutional question.

Quoting from Mitchell:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we [the Supreme Court] see no constitutional objection."

United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), "unhesitatingly" reaffirmed in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2280, 37 L.Ed.2d 796 (1973).

In the latter case the Supreme Court held that neither the First Amendment nor any other provision of the Constitution invalidates a law barring the following customary and ordinary First Amendment rights of those not shouldered with the responsibilities of federal employment: (1)

organizing a political party or club, (2) actively participating in fund-raising activities for a partisan candidate or a political party, (3) becoming a partisan candidate for, or campaigning for, an elective public office, (4) actively managing the campaign of a partisan candidate for public office, (5) initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office, and (6) serving as a delegate, alternate or proxy to a political party convention.

> "But, as the Court held in Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees'." 413 U.S. at 564, 93 S.Ct. at 2890.
>
> "There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.*
>
> "Neither the right to associate nor the right to participate in political activities is absolute in any event [citations omitted]." 413 U.S. at 567, 93 S.Ct. at 2891.

The right of the teacher-appellants to send their children to a private school, whether grounded in the Constitution or not, is not at stake in this appeal. Nobody is contesting their primary right to do so.

No racial bias is involved. The teachers are white.

There is no *Singleton* issue in the failure to re-employ them; this was not a reduction in force prompted by an effort to achieve unitary status.

The teachers did not have tenure.

There is no contention that the school board policy was pretextual or sprang from anything other than complete good faith. It applied to all teachers who had educable children and some of them complied with it.

There is no substantial evidence of the existence of any valid educational factor available at the private school not also available at the public school.

The case then boils down to this:

Under the facts of this case, does the United States Constitution deny a public school board the authority to adopt and uniformly enforce a policy clearly designed, in good faith, to insure the undivided dedication of its teachers (and the appearance of that dedication) to the public school function? Under the authorities above cited, I respond that it does not.

Actually, those of the general public, who pay the taxes, who keep the public school doors open, and who depend on those schools to educate their children, have a right to expect undivided teacher dedication, free of any real or apparent conflicts of interest.

Here, the teacher-appellants seek to defeat that public right by saying that because they have a right to send their children to private schools they also have the constitutionally guaranteed right to be employed in the public schools in defiance of the considered judgment of the school board that such a practice is not good for the schools which they have assumed an obligation to foster and maintain.

I simply do not believe that the Constitution may be stretched so far.

We are not here dealing in isolation with the rights of parents as to the education of their children. This is only a springboard from which teachers (who also happen to be parents) are trying to jump to the desired result. We are confronted with altogether different claims: we are asked to hold as a matter of constitutional law that they may *command* for themselves employment in a public agency in *defiance* of the declared public policy of that agency, a policy which could have no possible purpose other than to promote the unity of, and public confidence in, the public school system. In such a collision of interest, the asserted "parental right" must yied. On balance, concerned as we are with the general, discretionary power of school boards to manage public schools, the board policy should prevail and I see nothing in the Constitution to forbid it.

I stand on what the Supreme Court said in Adler v. Board of Education (1952), hereinabove cited, that persons employed or seeking employment in public schools have no right *to do so on their own terms,* that to maintain the integrity of public schools as part of an ordered society school authorities have the *right* and the *duty* to screen teachers in a relevant manner, not inconsistent with *basic* civil rights.

For these reasons, I vote to affirm the judgment of the District Court. In so doing I find no necessity to put a "desegregation" gloss on the decision.

Separate View of Circuit Judge Roney

We are asked to review a judgment in favor of school authorities who were sued by three former teachers for reinstatement, back pay, and other relief on the ground that the teachers were not rehired for unconstitutional reasons. I would affirm the judgment of the district court

on the particular facts of this case on a very narrow ground.

Mississippi teachers are nontenured. School authorities may refuse to rehire a teacher "without any reason at all." Thompson v. Madison County Board of Education, 476 F.2d 676, 679 (5th Cir. 1973). They may not refuse to rehire them, however, for an unconstitutional reason. Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Plaintiffs held one-year contracts which expired at the end of the school year. They were not discharged. They were, on the other hand, not rehired. The plaintiffs had the burden of proving that the action of the school authorities in failing to rehire them was unconstitutional. I think they failed in such proof. I would rest an affirmance on the findings of fact of the district judge as they apply to these individual plaintiffs.

The court found as a fact that the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated school system. This finding is not clearly erroneous. The court accepted the evidence that this conduct significantly related to the effectiveness and job performance of the teachers. The successful operation of the public schools as a unitary system under court-ordered desegregation was seriously challenged by the existence and public support of Calhoun Academy. The court found, without dispute, that the failure to rehire these teachers by the school authorities was for no other purpose than to strengthen local support for the public schools and to effectively implement the court-ordered requirement to change from a dual segregated school system to a unitary nondiscriminatory system. Under these circumstances, I would affirm the district court's conclusion that the school authorities acted within their discretionary authority.

Whether similar action would be valid under less compelling circumstances, we need not decide. Although it

would have been preferable for the school board to treat each plaintiff individually, and although the evidence is somewhat general rather than specific, I think that the district court had a sufficient base to apply the general evidence to the individuals. It appears to me it did this in fact, if not by specific language, when it assessed the individual testimony as to the reasons each gave for placing the children in Calhoun Academy. I would not get to the question of the validity of the general policy unrelated to this specific case of court-ordered desegregation. This case, to me, does not have broad implications.

CLARK, Circuit Judge (dissenting).[1]

I.

Plaintiffs claim that the challenged policy infringes their personal freedom as parents to choose the academic environment in which their children will be educated. This right received explicit judicial recognition in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), where it was expressed as "the liberty of parents and guardians to direct the upbringing and education of children under their control," and has been repeatedly reaffirmed since as one of several "fundamental" rights falling within the constitutional guarantee of personal privacy. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Whether viewed as a part of a citizen's Fourteenth Amendment liberty or First Amendment freedom of association or a combination of both, the right plaintiffs' claim is protected from state in-

[1] As the explanation following the statement of facts indicates, the text of these dissenting views was originally prepared as a proposed majority opinion to reverse the judgment of the district court.

trusion by the Due Process Clause of the Fourteenth Amendment.[2]

As a fundamental right, the prerogative of parents to direct their children's education supersedes the state's more generalized interest in the public school system, and sustains the corollary freedom of private schools to exist and operate. "[A] State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parent's choice." Norwood v. Harrison, 413 U.S. 455, 461, 93 S.Ct. 2804, 2808, 37 L.Ed.2d 723, 729 (1973). This right exists without regard to the parents' motives for choosing private over public education, or the popularity or social utility of the private school's *raison d'etre*. *See* NAACP v. Button, 371 U.S. 415, 88 S.Ct. 328, 9 L.Ed.2d 405 (1963).

The scope of this parental right is not without limit, however. An accommodation must be reached whenever its exercise conflicts with the state's interest in maintaining the general public welfare. "The parent cannot assert an absolute freedom to remove his child from all schooling, or to send him to a school where the curriculum includes not only mathematics but also the desirability and techniques of immediate violent overthrow of the government." Green v. Connally, 330 F.Supp. 1150, 1167 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971). To be sustained, an accommodation that in-

[2] *Compare* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of privacy founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action) *with* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) ("By Pierce v. Society of Sisters, *supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments") *and* Green v. Connally, 330 F.Supp. 1150 (D.D.C.1971) (freedom of association supports the right to educate child in the school of the parent's choice).

fringes upon this parental right must be tested against certain well-established principles. "Where certain fundamental rights are involved, the court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, *supra,* 410 U.S. at 155, 93 S.Ct. at 728, 35 L.Ed.2d at 178 (citations omitted); *see* Griswold v. Connecticut, *supra;* Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). A statutory classification that infringes upon fundamental freedoms must be not merely rationally related to a valid public purpose, but must be *necessary* to the achievement of a compelling state interest. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

The state cannot avoid this scrutiny by offering the discredited dogma of Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952), that public employment which may be denied altogether may be conditioned upon the surrender of constitutional rights. That theory died aborning, *see* Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); and was recently retrenched in Perry v. Sindermann, 408 U.S. 593, 93 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Nevertheless, teachers occupy a unique position as the instruments by which the state delivers vital educational services to public school pupils. Because of this, their personal constitutional rights will often come in conflict with legitimate competing interests of the school boards who employ them. The task of the teacher is one of such sensitivity and public involvement as to justify employer evaluation on the basis of conduct both in and out of the classroom, Beilan v. Board of Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958), and to sustain state inquiry into associational activity beyond that which would be proper as to the ordinary citizen or employee. Shelton v. Tucker, 364 U.S. 479, 81

S.Ct. 247, 5 L.Ed.2d 231 (1960); Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971). While "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it remains equally true that "First Amendment rights [must be] applied in light of the special characteristics of the school environment." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

That the Board's policy imposes a substantial burden upon the exercise of a fundamental right is clear. Equally clear, however, is the legitimacy of the interest claimed by the Board and found by the court to be served by the policy, *i.e.,* the elimination of racial discrimination and its "pervasive influence" from the public schools.

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.

Green v. Connally, *supra,* 330 F.Supp. at 1167 (footnotes omitted). If this language be broadly interpreted and literally applied, the personal freedoms of public employees could be curtailed by any governmental action that remotely furthers "the interdiction of racial discrimination." The footnote to the final sentence quoted above provides the crucial limitation: "Where there is a compelling government interest even First Amendment freedoms may be limited by *appropriately confined lesser measures* although they could not be prohibited directly." 330 F.Supp. at 1167 n. 36, *citing* Shelton v. Tucker, *supra* (emphasis added).

When legitimate governmental concerns are expressed in legislation that clearly conflicts with the exercise of a fundamental right, the validity of the means chosen must turn on the precision with which the government can identify the unprotected conduct. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, *supra,* 364 U.S. at 488, 81 S.Ct. at 252, 5 L.Ed.2d at 237 (footnote omitted); *see* United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971).

The two psychologists provided the only possible link between the policy of requiring the children of public school teachers to attend the public schools and the Board's legitimate interest in providing an equal educational opportunity to all its students. Their testimony indicates that an objectionable effect in the classroom could result from student perception of the teacher as being uncommitted to desegregated public schools. The student who so perceives the teacher, whatever that teacher's actual belief, will "perceive rejection, and experience a sense of inferiority, . . . and be inclined to perform at a lower educational level."

Even accepting the existence of a significant depressant effect on a child's ability to learn, from a teacher who does not appear to support desegregated education, there would remain a serious question regarding the accuracy of the further necessary presumption that all teachers who send their children to segregated private schools convey the debilitating image. Certainly it must be conceded that many valid reasons abound for choosing private over public education—reasons which would retain their validity in the context of court ordered desegregation, and can be understood and appreciated by adult and child alike to have legitimate, non-racial bases. Obviously too, a student who is aware of legitimate reasons for the decision will not perceive the teacher as antipathetic and should not suffer any adverse effect.

It is more important, however, to recognize that a teacher's effectiveness in the classroom is a complex composite of variable elements, no one of which universally will determine academic success. One of the experts here indicated that "reinforcement," the relevant psychological principle, was affected by many factors, such as "paying attention to students, showing respect, trust, acceptance." Doubtless, he left many more unlisted. A teacher who is perceived by her students to reject the viability of desegregated education may have other strengths and abilities that more than compensate for the one negative factor and enable her to provide "positive reinforcement" to her students and to remain an effective classroom performer. The presence of such teachers in the public schools in no way interferes with the Board's duty to offer a non-discriminatory education, and no legitimate governmental interest would be served either by the teachers' compliance with the policy or their exclusion for noncompliance.

I find equally doubtful the apparent assumption that compliance with the policy will dissipate the harmful perceptions that are said to justify its application. To the extent the impermissible influences at which the policy is aimed result from the teacher's actual attitudes and beliefs, as in the case of "teacher expectations," the choice of schooling for the teacher's own children is no more than one evidence of an underlying bias. Unlike the impairment of the teacher's ability to reinforce learning that results from the students' perception (or misperception) of the teacher, the harm that results from the teacher's perception of the student has not been shown to be remediable simply by removing this single appearance of disloyalty. Can a teacher's achievement expectations of the students in her classroom

be expected to change after the enforced enrollment of her own children in the same school system, particularly if the discrepant expectations have a racial basis?

The fit between the Board's policy and the governmental interest it is alleged to serve is thus highly imperfect: it excludes from the public schools teachers who do not possess the characteristics that underlie its premises but who are unwilling to abide by its terms, while it permits to remain teachers who possess racial attitudes of much greater disadvantage to their students. Whatever actual benefits may accrue to the school system by operation of the policy will be as much by coincidence as by design. The reason for this is plain. The Board has incorrectly singled out a teacher's decision to send his or her own children to private school as an infallible indicator of an undesirable classroom effect that it has a legitimate interest in removing. Because of this, the policy acts arbitrarily to deny a fundamental right to public school teachers and therefore cannot be upheld.

Of course a school board should be free to dismiss any teacher whose personal beliefs and actions substantially impede effective classroom performance. This public employer is completely on a par with the private employer in the ability to require that job performance take precedence over an employee's private life. The Constitution requires, however, that if a determination of unfitness is to be made from a presumption based on protected activity, that activity must be conclusively shown to evidence a harmful trait. The expert testimony falls far short of establishing as "necessarily or universally true in fact" the presumption of an impermissible classroom effect. Then too, the Board has a reasonable alternative means of making the determination as part of its evaluation of each teacher's performance. In these circumstances, the Board's overbroad employment policy should be stricken as violative of the Due Process Clause of the Fourteenth Amendment. *See*

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1973).

II.

After upholding the constitutionality of the policy, the court below went on to reject plaintiffs' procedural due process claims, holding that whatever entitlement plaintiffs might have to a hearing before the Board prior to termination had been satisfied by its judicial proceedings. *See* Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). Thus, review of the court's decision cannot end on a determination that the policy cannot stand as a *per se* rule. Scrutiny must be made of the court's implicit finding that the premises underlying the policy correctly identified valid, constitutional reasons for the dismissal of these plaintiffs as individuals.

To sustain a determination of unfitness on the basis of protected activity, the governmental interest to be served must outweigh the infringement of personal liberty, viewed in the special environment of the schoolroom. "The problem in any case is to arrive at a balance between the interests of a teacher, as a citizen, in [the exercise of a fundamental right,] and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811, 817 (1968); *see* Ferguson v. Thomas, *supra;* Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). Despite acknowledging the applicability of the *Pickering* balancing of interests test to the refusal to rehire these teachers, the district court apparently accepted the Board's argument that the interest in ending discrimination, in and of itself, ordained the result. No values were assigned to the teachers' rights, nor was any method of balancing the

competing interests defined. Rather, the court concluded that since the Board's policy was "based upon logic that is readily discernible" and "adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court," it should be enforced. By thus assaying only one of the competing interests at stake, the court cast the balance irretrievably in the Board's favor. This disposition does not represent the careful weighing of constitutional values that *Pickering* commands.

Defendants claim that the challenged policy furthers five legitimate governmental interests: (1) the compelling interest in meaningful public education; (2) the assurance of complete and total support, loyalty and dedication of the public school teachers in Calhoun County to the public school system and its duties; (3) the elimination of an improper influence on the educational process of the public schools of Calhoun County; (4) the maintenance of appropriate classroom effectiveness and performance of its teachers; and (5) the affirmative duty of the Calhoun County public school officials to eliminate racial discrimination from the public schools. It is in this last listed interest that majority and the court below find the mandate to override the personal rights of public employees. No part of the earlier desegregation order literally commanded the Board to adopt the policy. Nevertheless, defendants claim that the action was both required and justified by the court order to bring about a unitary school system and the Supreme Court decisions interpreting *Brown II*[3] to require comprehensive efforts to remove all vestiges of racial discrimination from the public schools.

In support of this contention, defendants draw principally on Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). In *Green*, the Court held

[3] Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

that, under *Brown II*, "school boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the *affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.*" *Id.* at 437-38, 88 S.Ct. at 1694, 20 L.Ed.2d at 723 (emphasis added). This duty includes the desegregation of faculty and staff of the public schools, "not because of teachers' employment rights, but because students are entitled to a nonracial education, and the assignment of teachers to students on the basis of race denies students that right." Lee v. Macon County Board of Education, 267 F.Supp. 458 (M.D.Ala.1967); *see* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); Rogers v. Paul, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965). Specific guidelines for the satisfaction of the *Brown II* mandate with respect to student body and faculty desegregation in individual schools have been developed on a case-by-case basis. *See, e.g.,* United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. 1967), cert. denied *sub nom.* Board of Education of City of Bessemer v. United States, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed.2d 104 (1967); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970); *see generally* Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 402 U.S. at 18, 91 S.Ct. at 1277, 28 L.Ed. 2d at 567. Other decisions have emphasized that a school board "is not only under an obligation not to foster discrimination, but to affirmatively eliminate impediments to a unitary system of education." Augustus v. School Board of Escambia County, 361 F.Supp. 383, 387 (N.D.Fla.1973), modified and remanded, 507 F.2d 152 (5th Cir. 1975).

In matters which directly involve the classroom, a school board's interest in maintaining the quality of its educational offering weighs far heavier than the teacher's right to insist upon the exercise of personal freedoms and liberty. Restraints upon individual expression in or about the school

that conflicts with the board's constitutional duties are justifiable. For example, in Smith v. St. Tammany Parish School Board, 316 F.Supp. 1174 (E.D.La.1970), aff'd, 448 F.2d 414 (5th Cir. 1971), the court banned the display of Confederate flags and banners in the schools "expressing the school board's or its employees' desire to maintain segregrated schools" noting that "[n]ot only is the school board to operate a unitary system but the system must be racially non-discriminatory. . . . The retention of Confederate flags in a unitary school system is no way to eliminate racial discrimination 'root and branch' from the system." 316 F.Supp. at 1176; *see also* Augustus v. School Board of Escambia County, *supra*.

Only one case in this circuit has interpreted a school board's affirmative duty to eliminate discrimination to require the board's consideration of a teacher's personal racial attitudes in making employment decisions. In United States v. Indianola Municipal Separate School District, 410 F.2d 626 (5th Cir. 1969), this court reversed the district court's approval of a school desegregation plan that, *inter alia*, failed to make adequate provision for faculty integration. Noting that no black teachers taught at either "white" school and only one white teacher taught, for a half-day each week, at only one of the two "black" schools, the court held:

> The school board must *actively seek out* qualified instructors who are willing to teach children of any color. The voluntary approach is demonstrably not adequate, and the school board must do everything within its power to recruit and reassign teachers so as to provide for a substantial degree of faculty integration. . . . We agree that the school board *must* withhold approval of teacher contracts if that is necessary to achieve more racially balanced faculties. "The board's responsibility is not optional: It must withhold approval of contracts if necessary to achieve faculty desegrega-

> tion." United States v. Greenwood Municipal Separate School District, [406 F.2d 1086 (5th Cir. 1969)] 406 F.2d at 1094.

410 F.2d at 630 (emphasis in original). *Indianola* basically relates to the board's duty to employ personnel whose race can accomplish the numerical desegregation of the teacher corps of a formerly dual school system. An obvious incident of this duty was the recruitment of black teachers willing to teach white children and white teachers willing to teach black children. The only articulated limitation upon personal attitudes is a willingness to instruct children of any race—a condition that is so intimately job-related as to make discussion of its impact upon classroom performance unnecessary.

While the decisions of this circuit as well as of the Supreme Court clearly establish the primacy of the duty to eliminate racial discrimination from the public schools, they cannot establish that in a particular case the exercise of fundamental rights actually impinges upon the educational process. It is the degree to which the respective interests are shown to unavoidably conflict that enables essentially intangible rights to be "balanced." I reject the notion that the desegregation order or judicial precedents obviate application of the *Pickering* test in these circumstances.

As demonstrated in Part I of this dissent, the only evidence that employment of these teachers would frustrate the Board's efforts to provide a non-discriminatory education was altogether abstract. While no prior similar cases have dealt with precisely the kind of subtle psychological effect asserted here, they have uniformly required a showing of more than a speculative inference that constitutionally protected activity could interfere with a state interest. Tinker v. Des Moines Independent Community School District, *supra*, concerned the exercise of personal rights by students rather than teachers, but we have inter-

preted its tenets as equally applicable to the regulation by school boards of both. *See, e.g.,* Fluker v. Alabama State Board of Education, 441 F.2d 201 (5th Cir. 1971); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). In *Tinker,* the school board had forbidden the wearing of black armbands by students while on school facilities. The Supreme Court, drawing from the Fifth Circuit decision in Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), held that in the absence of a reason to forecast substantial disruption or material interference with school activities, the regulation impermissibly infringed the students' right to freedom of expression. In James v. Board of Education of Central District No. 1, etc., 461 F.2d 566 (2d Cir.), cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491 (1972), the Second Circuit confronted a situation identical to *Tinker* except that it was a teacher, not a student, who sought to wear a black armband in class to protest war. As in *Tinker,* the court found insufficient evidence of actual disruption to justify the infringement of freedom of speech. "Although we can imagine situations in which a teacher would be so controversial because of his tenets or beliefs that he would be a disruptive force in the school, no one would suggest that he could be dismissed merely because he was *identified* with a particular cause if he did not preach that cause in class." 461 F.2d at 572, n. 13. *James* did, however, point out that there was no "suggestion whatsoever that his armband interfered with his teaching functions, or, for that matter, that his teaching ever had been deficient in any respect." 461 F.2d at 574-75 (footnote omitted).

In Smith v. United States, 502 F.2d 512 (5th Cir. 1974), this court adopted the standard of material and substantial interference to test claims of arbitrary action by a public employer.

> When a government employee asserts that his rights have been unconstitutionally infringed, it is necessary to strike a balance between the interests of the em-

> ployee as a citizen and the interests of the government in promoting the efficiency of the services it performs through its employees. In striking that balance in the context of the First Amendment guaranty of freedom of speech, we feel that the standard of material and substantial interference is the standard to apply. In order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment. Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971).

502 F.2d at 516-17.[4] The plaintiff-appellant in *Smith* was a clinical psychologist at a Veterans' Administration hospital who was discharged after repeated requests by his supervisor that he cease to wear a "peace pin" *while on duty.* In upholding his discharge, we found the evidence sufficient to establish "that the wearing of the peace pin . . . while on duty resulted in a material and substantial interference with the performance of his duties as a staff psychologist charged with the duty of administering psychotherapeutic treatment to emotionally disturbed veteran patients." The need for a demonstration of material and substantial interference with actual job performance would seem to be at least as great here. The alleged interference in today's case results not from the teachers' conduct while in the classroom or about the school, but from the uncontrollable and possibly groundless perceptions of others that might result from their knowledge of a personal family decision which in itself was wholly unrelated to the job.

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[4] *Cf.* Doherty v. Wilson, 356 F.Supp. 35 (M.D.Ga.1973) ("A school board may fire, refuse to rehire or refuse to hire a teacher who has exercised constitutionally protected rights in such a manner as to seriously impair or destroy her effectiveness as a teacher.").

Elimination of racial discrimination, and its effect on developing attitudes and values, from public education is judicially established as a constitutional mandate. However, the evidence in this record establishes no more than that one facet of these teachers' private lives carrys a potential to instill a negative value into the relationship between teachers and their students. The proof does not disclose that the impact of this negative force is so debilitating that these teachers' ability to contribute to the advancement of quality education in a unitary system would be overborne in every case or indeed in any one of their cases, or that the students of these teachers will derive from the knowledge of this fact feelings of rejection so deep that no effort the teachers may put into their work can overcome them. The failure of the evidence to demonstrate that their protected activity would substantially and materially interfere with the discharge of their teaching duties and responsibilities should have brought the balance down on the teachers' side.

It is clear to me that the school's policy is unconstitutionally overbroad. It was not shown to form a proper basis for the defendant's decision not to offer reemployment to any one of these plaintiffs individually. The decree appealed from ought to have been reversed for a school board determination of each plaintiff's case, free from the unconstitutional constraint of the school board policy. Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. The problem is that the decisional principle it establishes applies to all forms of personal associations from the Ku Klux Klan to Black Panthers, and from membership in the Citizens Counsel to membership in the NAACP. Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1038

D.C. Docket No. WC-73-65-K

BILLY D. COOK, ET AL., *Plaintiffs-Appellants,*

v.

ROBERT W. HUDSON, Etc., ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Mississippi

Before COLEMAN, CLARK and RONEY, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 21, 1975

COLEMAN and RONEY, Circuit Judges, filed separate opinions setting forth their respective views.

CLARK, Circuit Judge, dissenting.

Issued as Mandate:

UNITED STATES DISTRICT COURT,
N. D. MISSISSIPPI, W. D.

No. WC-73-65-K.

BILLY D. COOK, et al., *Plaintiffs*,

v.

ROBERT W. HUDSON, et al., *Defendants*.

Nov. 1, 1973.

* * * * * * * * * *

Memorandum Opinion

KEADY, Chief Judge.

In this § 1983 case, the plaintiffs, Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, formerly employed as teachers at the Calhoun City Attendance Center, sue the Board of Education of Calhoun County, Mississippi, the County Superintendent of Education and the school principal for reinstatement, back pay and other relief. Claiming that they were unconstitutionally discharged, plaintiffs invoke federal court jurisdiction under 28 U.S.C. § 1343(3). The cause was initially set for hearing on plaintiffs' motion for preliminary injunction; however, the parties consenting thereto, trial of the action on the merits was advanced and consolidated with the preliminary hearing. Following the presentation of evidence at two separate hearings and submissions of briefs by counsel, the case is now ripe for final decision.

Certain background facts provide the setting for the present controversy. On August 9, 1968, this court entered an order terminating the dual school system previously existing in the public schools of Calhoun County which had proved to be ineffective under freedom of choice and directed immediate desegregation. By the order in United States of America v. Calhoun County Board of Education, No. WC- 6637, pupils in the first three grades were assigned to county schools in accordance with geographic zones for the 1968-69 school year; and pupils in grades 4, 5 and 6 were so assigned the next school year, 1969-70, coincident with the desegregation of the upper six grades subsequently ordered. Entering a standard *Singleton*-type decree with respect to faculty, staff, transportation and other services activities and facilities, the court enjoined the board to take affirmative steps to eliminate racial discrimination from the public schools and to bring about a unitary school system within the county.

At the time of the court order, no private school, either religious or secular, had ever existed in Calhoun County. Within one month thereafter, local citizens formed the Calhoun Educational Foundation Corporation, organized to establish and operate Calhoun Academy, a secular private school which from its beginning has been attended by an all-white student body and served by an all-white faculty and staff.

When first established, Calhoun Academy was located about six miles south of Calhoun City, and originally provided the first three grades for elementary students who, except for desegregation, would have attended public school at Calhoun City. Subsequently, the school employed D. L. Harrison, former public school principal, as headmaster. The Academy has sinced moved to a new location north of Calhoun City; the school has added six more grades and enjoys significant support of certain citizens and local organizations, notably the local chapter of the Citizens Council, interested in maintaining a racially segregated education program. Calhoun Academy, because of its failure to adopt racially nondiscriminatory admission policies satisfactory to Internal Revenue Service, no longer has tax exempt status under § 501(c)(3) of the Internal Revenue Code,[1] nor has the school, though initially sup-

[1] Green v. Connally, 330 F.Supp. 1150 (D.C.D.C.1971, 3-judge), aff'd sub nom Coit v Green, 404 U.S. 997 92 S.Ct. 564, 30 L.Ed.2d 550 (1971); and affidavit filed therein of Commissioner of Internal

plied with state-owned textbooks, qualified to continue receiving such textbooks pursuant to this court's order implementing the Supreme Court's decision in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). It is inescapably clear that Calhoun Academy is a racially discriminatory institution formed in the wake of public school desegregation to provide a haven for segregated education.

In November 1972 the school board, acting upon the recommendation of its attorney, the superintendent and other school officials, verbally adopted a policy which, though never reduced to writing, is agreed to provide as follows: "Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun City, Mississippi, would be required to attend the public schools of said Calhoun County, or said teachers would not be employed or reemployed." The evidence establishes that although stated in general terms, the policy was adopted only with Calhoun Academy in mind, as that institution still remained the only private school within a county where parochial or religious schools had never existed.

In November 1972, the children of 8 public school teachers were enrolled in the Academy; and its student body was wholly composed of white children residing in the county. Although informally adopted, the board's policy was nevertheless made known to the teaching staff without delay; it was freely discussed among the teachers who understood it would become effective at the beginning of the next school year. The board did not expressly provide that any teacher affected by its policy would be granted a

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Revenue on September, 30 1970, revoking advanced assurance of deductibility as to 9 private schools, including Calhoun Academy; Internal Revenue Bulletin No. 1971-12 dated March 22, 1971; letter dated July 3, 1973, from District Director of Internal Revenue to W. A. Matthews, Mississippi Text Book Purchasing Board.

hearing; and no teacher, including the plaintiffs, ever requested a hearing, or was refused one by the board.

When new teacher contracts were being made in April-May 1973, Roger W. Hudson,[2] principal of the Calhoun City Attendance Center, refused to recommend the plaintiffs for teaching positions on his faculty. The sole reason for refusal was that the plaintiffs, otherwise qualified to continue their teaching duties, stated that they could not comply with the board's policy, and concededly they have not done so. It is undisputed that plaintiffs were informed that the failure to comply with the board's policy would preclude their reemployment, but plaintiffs, unlike some other teachers in the system, elected not to comply and preferred to send, or continue sending, their children to Calhoun Academy. Each plaintiff testified at the hearing.

Billy D. Cook, a high school, teacher with 5 years' experience in the Calhoun public schools, enrolled his two children, ages 7 and 5, in the private academy, in, a belief that it provided "a calmer environment" for them and insured against his showing them "natural partiality of a parent" while attending public school. Ms. Adams, who had taught two years at the Calhoun City Attendance Center, enrolled her two small children in the private school, deeming them to be better off in "a calmer situation" where they would receive more individual attention and be exposed to daily devotions, including the reading of Bible stories. One of Ms. Adams' children had a speech defect or difficulty which she stated influenced her decision although a speech therapist was employed at the public school but not at the private academy. Ms. Adams, like Mr. Cook, was a Baptist and conceded that the Academy was a secular and not a religious school. Ms. Wright, a Methodist, had taught six years as a home economics teacher in the Calhoun County public schools. Her two children, ages 10 and 7,

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[2] Erroneously sued as Robert W. Hudson.

had attended the private school for several years when the board's policy was announced. Her reasons for so enrolling them were of a similar nature, as she preferred for her children the smaller class groupings and exposure to Bible studies and devotional exercises. Moreover, Ms. Wright found that the Academy was of greater convenience for her children to attend than the public school since it was within walking distance of the family residence. Ms. Wright had withdrawn her older child from the public school the first year of desegregation, had devoted considerable time to promoting the private school, and acknowledged that she was not totally committed to a desegregated public school system. Each plaintiff's testimony was, on cross-examination, substantially impeached as to the underlying cause for the decision to patronize the private school. The court concludes, as a fact, that the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system.

Plaintiffs challenge the constitutionality of the board's policy on several alternative grounds, which may be summarized as follows: (1) The policy violates First Amendment rights they have as parents to send their children to a school of their choice in the exercise of freedom of association and freedom of religion; (2) The policy, applicable on its face to all private schools of every description, is both impermissively broad and indiscriminate and also an unreasonable and arbitrary classification, thus offending and Equal Protection and Due Process Clauses of the Fourteenth Amendment; and (3) The policy further contravenes the procedural due process rights safeguarded by the Fourteenth Amendment since it failed to provide plaintiffs with a hearing before the school board and a reasonable opportunity to present their individual grounds for not complying with the blanket policy before being terminated as teachers in the public school system.

Defendants, denying the foregoing contentions, claim that plaintiffs have no viable First Amendment rights in expecting or seeking continued employment in the public schools of Calhoun County, that the board's policy, as applied to plaintiffs whose children attend a racially discriminatory private school, is a reasonable regulation by any standard of equal protection review, and finally, that plaintiffs, being non-tenured teachers without more than an expectancy of reemployment, had no due process rights to a hearing prior to not being offered new contracts of employment, or, if such right did exist, their claims in this regard are now properly before the court for determination after full hearing, and plaintiffs have failed to show substantial grounds for exemption under the board's policy.

While the board's policy may be novel and one not heretofore judicially ruled upon, we are of the opinion that the case is controlled by familiar principles of constitutional law and the policy should be upheld as applied to the facts of this particular case. No relief can be granted to the plaintiffs.

[1-4] Plaintiffs rely, primarily, upon the constitutional right as parents to send their children to the school of their choice, in accordance with the First Amendment "freedom of association" right vouchsafed to them by Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and assert that under Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), they cannot be required to forfeit these First Amendment privacy rights as a condition of further public school employment. The Supreme Court cases upon which plaintiffs rely are, in our view, both factually and legally distinguishable and do not sustain them in the present factual setting. Conceding

there must be clear justification for curtailing or limiting First Amendment rights, nevertheless, plaintiffs' rights as parents may not be considered in isolation, and to the exclusion of other constitutional demands of equal, if not greater, magnitude. "As no constitutional guaranty enjoys preference, so none should suffer subordination or deletion." Ulmann v. U.S., 350 U.S. 422, 76 S.Ct. 497, 100 L. Ed. 511 (1956). The instant case, at first blush, may appear to present a choice between competing values that might be urged under the First Amendment and what is done infulfillment of the Fourteenth Amendment. As *Pickering* makes clear, courts must "arrive at a balance between the interest of a teacher, as a citizen [in the exercise of First Amendment rights], and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568, 88 S.Ct. at 1734. Thus, First Amendment rights must be applied "in the light of the special characteristics of the environment of the particular case," Clark v. Holmes, 474 F.2d 928, 931 (7 Cir. 1972); Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 506, 21 L.Ed.2d 731 (1969); and where the exercise of First Amendment rights impairs the teacher's effectiveness, or conflicts with the performance of his job, the school board may lawfully refuse to rehire the teacher. Cf. Cole v. Choctaw County Board of Education, 471 F.2d 777 (5 Cir. 1973). The Supreme Court succinctly stated in Adler v. Board of Education, 342 U.S. 485, 492, 72 S.Ct. 380, 384, 96 L.Ed. 517, 524 (1952):

> "[Teachers] have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

It necessarily follows that if the board's policy is a reasonable and constitutional regulation, plaintiffs may not complain of the consequence of not being rehired as public school teachers for having exercised their right to send their children to a private school.

The validity of the board's policy presents a more serious issue since it applies, literally, to all private schools of every description and regardless of particular circumstances that might motivate parental desire for private, and not public, schooling. Yet the undisputed proof shows that the school board, the plaintiffs and the local community understood that the regulation was adopted, and has been applied, only as to public school teachers who patronize the racially discriminatory private school at Calhoun City. We express no opinion as to whether the policy might validly extend to teachers sending their children to schools which do not foster racial discrimination but are specially designed for physically handicapped or mentally retarded children or offer other specialized training not in general competition with the public school system. Since private schools of that nature are not attended by plaintiffs' children, they cut no figure in this case. We, therefore, construe the policy in the limited terms intended by the board and applied to the plaintiffs.

[5-7] The board's policy passess muster under the Equal Protection Clause of the Fourteenth Amendment if it satisfies the rational relation standard, which is the test ordinarily applicable to cases that involve the non-reemployment or dismissal of public school teachers. Cole v. Choctaw County Board of Education, supra; Fisher v. Snyder, 476 F.2d 375 (8 Cir. 1973); McEnteggart v. Cataldo, 451 F.2d 1109 (1 Cir. 1971), cert. denied, 408 U.S. 943, 92 S.Ct. 2878, 33 L.Ed.2d 767 (1972); Drown v. Portsmouth School District, 451 F.2d 1106 (1 Cir. 1971). By this standard, a regulation is invalid as a denial of equal protection of the law only if it is without some reasonable

basis and is palpably arbitrary; the regulation will be upheld so long as a state of facts reasonably can be conceived to support it. In our view, the board had ample justification to adopt its rule.

According to the weight of the evidence, the board was persuaded that the challenged rule was needed to eliminate racial discrimination from the public schools. Public school desegregation in Calhoun County was a controversial policy which caused a division in the community; many citizens immediately threw their support to continuing racial segregation in a private school to operate in competition with the public schools. Since white flight may present a serious obstacle to effective desegregation, a school board is empowered to adopt appropriate measures in aid of the schools under its charge. Defendants, without dispute, acted with no purpose or motive other than to strengthen local support for the public schools by requiring its teachers to give their undivided loyalty to the unitary school system and forego allegiance as patrons of schools practicing racial discrimination. A requirement of this kind, instead of being arbitrary and irrational, is based upon logic that is readily discernible. Defendants' experts in the field of educational psychology expressed the view which we accept, that the challenged policy was significantly related to a teacher's effectiveness and job performance: students in desegregated classes are likely to perceive rejection, and experience a sense of inferiority, from a teacher whose own children attend a nearby racially segregated school, and be inclined to perform at a lower educational level. Indeed, the Supreme Court itself has documented a finding that: "A sense of inferiority affects the motivation of a child to learn." Brown v. Board of Education, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880. Moreover, the Supreme Court, in *Norwood,* spoke of racially discriminatory private schools in these words:

> "Under Brown v. Board of Education, supra, discriminatory treatment exerts a pervasive influence on

> the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education." 93 S.Ct. 2812, 37 L.Ed. 2d 733.

Thus, an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools. Actions speak louder than words, to students no less than to adults. We hold that the board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools.

[8, 9] Finally, we consider plaintiffs' claim that the board's failure to provide them with a hearing prior to termination violated their procedural due process rights. Mississippi, of course, does not have a tenure system for public school teachers, and plaintiffs have failed to show the existence of any rules or understandings with defendants whereby they would be continued in employment beyond the period of their teaching contracts. Plaintiffs held one-year contracts which expired at the end of the 1972-73 school year; they were not discharged during the school year. Although all of the plaintiffs had been employed in the Calhoun County school system for several preceding years, none had more than a "subjective expectancy" of reemployment generated by prior periods of employment. Under these circumstances, it is settled law that a hearing was not necessary. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Skid-

more v. Shamrock Independent School District, 464 F.2d 605 (5 Cir. 1972); Moore v. Knowles, 466 F.2d 531 (5 Cir. 1927). In *Skidmore,* the court upheld the nonretention, without a board hearing or statement of reasons, of a teacher who had been employed for twenty-two consecutive one-year terms. In a Mississippi case, Thompson v. Madison County Board of Education, 476 F.2d 676, 679, the Fifth Circuit emphasized that at the *end* of a school year, a school board "can refuse to rehire a non-tenured teacher with no expectation of reemployment without any reason at all." In the instant case, however, plaintiffs were plainly advised of the reason for their nonretention and had every opportunity to seek a hearing before the board if they desired one. Indeed, the burden was incumbent upon them to initiate review proceedings, and to demonstrate that the board's failure to rehire was a violation of constitutionally protected interests. *Skidmore,* supra.

Assuming, however, that plaintiffs were entitled to a due process hearing, they have been accorded a full hearing in this court, and they have had opportunity to present evidence in support of their claims. In the light of the facts heretofore found, the court holds that the board's failure to rehire the plaintiff was a lawful act and did not constitute a violation of any constitutional rights held by plaintiffs.

Let an order dismissing the complaint with prejudice be entered.

Supreme Court, U. S.
FILED
MAY 15 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-503

BILLY D. COOK, ET AL.,
Petitioners,

versus

ROBERT W. HUDSON, Etc., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 1, 1975
CERTIORARI GRANTED MARCH 1, 1976

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In the United States District Court for the Northern District of Mississippi, Western Division

BILLY D. COOK, LOULA JUANITA MILTON ADAMS, AND MRS. W. P. WRIGHT

versus CA No. WC-73-65-K

ROBERT W. HUDSON, individually and in his capacity as Principal of the Calhoun CITY ATTENDANCE CENTER; JOHN BURT, individually and in his capacity as Superintendent of the Calhoun County Board of Education; JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER AND N. F. HANSON, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi; PRINCIPAL OF CALHOUN CITY ATTENDANCE CENTER; SUPERINTENDENT OF THE CALHOUN COUNTY BOARD OF EDUCATION; AND BOARD OF EDUCATION OF CALHOUN COUNTY, MISSISSIPPI

DATE	PROCEEDINGS
8- 9-73	Filed Complaint - Issued Summons Mailed assignment of Judge - A078 to Courtroom Deputy.
8-15-73	Filed Summons by Marshal's return served on 8-14-73 - exec - the following at Calhoun County, Mississippi. Robert W. Hudson,

John Burt, James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, N. F. Hanson, Principal, Supt., and Board of Education of Calhoun County, Miss. (Jones) DUSM

9- 4-73 Filed Answer of all defendants

9- 5-73 Filed Amended Answer of all defendants

9-17-73 Filed Subpoena by return on service-served on 9-11-73 - exec - the following at Calhoun City, Ms. - J. W. Potts, Durell Lunceford, Mrs. Bill Williams, Mr. Bill Williams, Mrs. Howard Taylor, Howard Taylor, George Simons, Jr., Mrs. Durell Lunceford, Kenneth Hardin, Billy Jack Stewart, Mrs. Kenneth Hardin, Mrs. George Simons, Jr.

9-13-73 After preliminary and final hearing - matter taken under advisement with counsel placed on briefing schedule. - placed exhibits in file — file taken to Greenville for Judge Keady

9-18-73 Filed Motion To Re-Open (copy mailed to Ray Mitchell, Law Clerk)

9-20-73 Received copy of letter dated 9-19-73 to attorneys from Ray Mitchell, Law Clerk concerning teacher, mother and child regarding this case

Received and entered Order signed 9-19-73 sustaining motion of defts. to reopen cause as to Calhoun Academy for further evidence - This cause is calendered for recessed hearing at Oxford, Ms. at 9 A.M. on October 12, 1973 at cob 23, pg. 16.

Mailed notice of order to attorneys

Mailed notice that recessed hearing has been set for October 12, 1973 at 9 A.M. in Oxford, Ms.

Received Pltfs. Proposed Findings of Fact (mailed original and copy to Judge Keady)

9-24-73 Received copy of letter concerning briefing schedule dated 9-21-73

10-12-73 Filed return of spa, exc. 10-4-73 on D. L. Harrison, Sr., Calhoun City, Miss.

10-12-73 Filed Civil Minutes - General - After hearing addl proof, case taken under advisement and counsel will orally argue case Mon., Oct. 15, 1973 11 AM in Oxford (subsequently cancelled)

Placed Exhibits in file

10-16-73 Filed Marshall's return on Spa. ex. 10-9-73 by serving W. A. Mathews at Jackson, Ms.

11- 2-73 Received Memorandum Opinion signed 11-1-73

Received and entered Order signed 11-1-73 denying pltfs. motion for preliminary injunction and dismissing complaint with prejudice cob 23, pg. 104 J.S. 6

Mailed notice of order to attorneys of record

11-13-73 Received corrected pages of the memorandum opinion issued Nov. 1, 1973

11-26-73 Filed Notice of Appeal

Mailed notice of filing of notice of appeal.

Filed Bond For Costs On Appeal

12-17-73 Filed transcript of proceedings taken on September 13, 1973 at Aberdeen, Ms.

Filed Transcript of proceedings taken on October 12, 1973 at Oxford, Ms.

1- 2-74 Mailed all pleadings to the Court of Appeals with exhibits

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[2] TRANSCRIPT OF PROCEEDINGS OF
SEPTEMBER 13, 1973
Filed: Dec. 17, 1973
In the United States District Court
for the Northern District of Mississippi
Eastern Division

BILLY D. COOK, LOULA JUANITA MILTON ADAMS, AND MRS. W. P. WRIGHT

versus CA No. WC-73-65-K

ROBERT W. HUDSON, individually and in his capacity as Principal of the Calhoun CITY ATTENDANCE CENTER; JOHN BURT, individually and in his capacity as Superintendent of the Calhoun County Board of Education; JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER AND N. F. HANSON, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi; PRINCIPAL OF CALHOUN CITY ATTENDANCE CENTER; SUPERINTENDENT OF THE CALHOUN COUNTY BOARD OF EDUCATION; AND BOARD OF EDUCATION OF CALHOUN COUNTY, MISSISSIPPI

[1] The following proceedings were had in the United States District Court, Northern District of Mississippi, on September 13, 1973, before The Honorable William C. Keady, Chief Judge, at Aberdeen, Mississippi.

APPEARANCES:

For the Plaintiffs:
The Honorable John B. Farese
The Honorable Peggy Jones

For the Defendants:
The Honorable Will A. Hickman
The Honorable S. T. Rayborn
The Honorable Paul M. Moore

[4] THE COURT:
The Court calls WC-73-65-K, Billy Cook and Others, Plaintiffs, vs. Roger W. Hudson and Others, Defendants, for hearing on Plaintiffs' Motion for Preliminary Injunction.
What say the Plaintiffs?

MR. FARESE:
The Plaintiffs are ready, may it please the Court.

THE COURT:
What say the Defendants?

MR. HICKMAN:
Defendants are ready, may it please the Court.

THE COURT:
Counsel has advised the Court in chambers that they are prepared to submit this matter today on final hearing; is that correct, gentlemen?

MR. FARESE:
That's correct.

MR. HICKMAN:
That's correct.

THE COURT:
Very well.
At this time, the Court will receive any stipulations from the parties. Mr. Farese.

[5] MR. FARESE:
May it please the Court, it is hereby stipulated and agreed by and between the plaintiffs and defendants that any reference to Coach Billy Cook, either in the pleadings or in any of the official records of Calhoun County relative to any alleged incompetency and relative to any alleged reason for his not being rehired are withdrawn and deleted and removed from any official correspondence of the Calhoun County School Board or this court's record, and especially a letter dated March 7, 1973, which will be introduced as an exhibit to this stipulation, and that the sole issue now before this Court is whether or not these three plaintiffs were entitled to teach in the Calhoun County System even

though their children attended private schools. And that the defendants now agree that the only issue before this court is whether or not the policy that they adopted was reasonable, or Constitutional, or violated the Constitutional rights of the plaintiffs in this case.
We also have one further stipulation which counsel for the defendants will advise the court.

THE COURT:
All right.
Mr. Hickman.

MR. HICKMAN:
May it please the Court, it is stipulated by and [6] between plaintiffs and defendants that all charges of malice, coercion and conspiracy made by plaintiffs against the defendants in their complaint are withdrawn and deleted and that the sole and only issue in this hearing is the policy as set forth in Paragraph 16 of the Amended Answer of the Defendants.

THE COURT:
All right.
Now, what relief is sought?

MR. FARESE:
Your Honor, we, of course, by stipulation, are foregoing any right to punitive damages.

THE COURT:
All right.

MR. FARESE:
We candidly tell the Court that. The only relief we are now seeking is that these people be reinstated and that they be paid for any losses that they might have sustained as a result of this policy. And that's all we are asking.

THE COURT:
All right.

MR. HICKMAN:
I understand it will be a question of equitable relief only.

THE COURT:
[7] Plus compensatory damages, if any?

MR. FARESE:
Yes sir.

THE COURT:
All right.
Now, are you prepared to make a stipulation of the basic facts for the Court's consideration before you put on evidence?

MR. FARESE:
We are ready.

THE COURT:
Is the regulation in writing?

MR. HICKMAN:
Only as set forth in the Amended Answer of the Defendants.

THE COURT:
Well, can we agree on the verbiage of the regulation? Can counsel do that and state it into the record?

MR. FARESE:
Your Honor, as counsel has candidly told the court, this was never in writing. The only thing that they say in their pleading is that a policy was adopted whereby any teacher who taught in the Calhoun County School System and lived there would have to send their children to public school. And that they would not be rehired or hired unless [8] they had their children in public school. And this is the language that they used.

THE COURT:
All right.

MR. FARESE:
Quote, a policy was formulated wherein prior to the employment of a new teacher or the reemployment of an existing teacher the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed.

THE COURT:
Is that —

MR. HICKMAN:
That is the policy.

THE COURT:
You agree on the words of the policy?

MR. HICKMAN:
I agree on the words.

THE COURT:
All right.
Is that contained in your complaint?

MR. FARESE:
This is in their Answer.

MR. HICKMAN:
[9] That is Paragraph 16 of the Amended Answer of the D fendants.

THE COURT:
Very well. I will treat that, then, as the regulation under challenge.
Is the Rule invoked?
You m ay have additional factual stipulations. If so, I invite them. That is to say, do you have a factual background on these three teachers?

MR. FARESE:
Your Honor, I think it would be agreed, according to —

THE COURT:
Along this line. Identifying each. How long were they employed, what subjects do they teach, what schools do they teach in and matters like that that should not be in dispute. Can you make that stipulation?

MR. FARESE:
We can, Your Honor.

MR. HICKMAN:
I think with the indulgence of the Court for a few moments, we can. We do not have such prepared.

THE COURT:
All right. That would save some testimony, would it not?

[10] MR. FARESE:
Yes, sir. And we could agree as to the salaries they were receiving and so forth.

MR. HICKMAN:
Yes, sir.

THE COURT:
All right. I will give you ten minutes to see if you can make a factual stipulation to be dictated into the record.
Recess the court till five minutes till ten.

(RECESS)

THE COURT:
All right, Mr. Farese.

MR. FARESE:
May it please the Court, it has been agreed and stipulated by and between the plaintiffs and the defendants as to the following statement of facts:

That the Plaintiff Coach Billy Cook is thirty-two years of age he has a B.S. Degree from Mississippi State, he taught for three years in the public school system of Georgia and five years in the public school system of Calhoun County as a football coach and social studies teacher. That his salary last year with the Calhoun County School System was Eighty-One Hundred Eighty Dollars, that in addition [11] thereto he was provided with a house and he was to pay for the cost of utilities. That this year, because of a Legislative Act, he would have obtained an increase of Six Hund ed Fifty Dollars. That as to Plaintiff Coach Billy Cook, he has secured employment with the private school, The Calhoun Academy, for which he is paid a salary of Nine Thousand Dollars, he is furnished a home and will be required to pay for utilities. That with the public school system, he would have obtained retirement benefits and other increments which teachers of his standing would have automatically obtained, together with any other benefits the Legislature might have given.

THE COURT:
Now, tell me about his children, their ages and so forth. Have you gone into that?

MR. FARESE:
No, sir. We haven't.

THE COURT:
I will give you a moment, see if you can —

MR. FARESE:
All right.

THE COURT:
Unless you want to develop that by testimony.

MR. FARESE:
That's what we had in mind.

THE COURT:
[12] All right. I will allow you to do it.
Go to the next one.

MR. FARESE:
All right, sir.

The Plaintiff Mrs. W. P. Wright is thirty-three years of age, she has a B. S. Degree in Home Economics from MSCW, she taught two years in the public school system of Chickasaw County, at Houston, Mississippi, and had been employed for six years in the Calhoun County School System. She has a Special Certificate in Special Education. She would have received a salary this year with the public school system of Six Thousand Five Hundred Twenty-Eight Dollars plus Six Hundred Fifty Dollars which the Legislature granted in the form of a raise to all teachers having a degree that she has. Mrs. Wright is not employed, she is presently unemployed.

THE COURT:
What are the race of these two people?

MR. FARESE:
All three are members of the white race.

THE COURT:
All right.

MR. FARESE:
Mrs. Loula Juanita Adams is thirty years of age, she has a B.S. Degree in Library Science from MSCW, she was also qualified to, and did, teach English. She taught for one [13] year at Northeast, at Laurel, Mississippi, one and one-half years in the public school system at New Albany, Mississippi, and had been teaching two years in the Calhoun County School System. Her salary was Six Thousand Two Hundred Dolla s last year. She would have been entitled this year to an additional One Hundred Twenty-Dollar increment plus Six Hundred Fifty Dollars additional salary. She is now working as a secretary part-time, on a temporary basis, with a boat paddle manufacturer in Calhoun City and receiving Seventy-Four Dollars per week as a salary.

MR. HICKMAN:
Would the Court indulge us?

THE COURT:
Yes, sir.

MR. FARESE:
Your Honor, for the purposes of clarification of the record, counsel has directed my attention to the fact that out of this pay they would have withheld a percentage for the State Retirement Plan.

THE COURT:
All right.
Now, may I inquire the date of the adoption of this policy, when these teachers were notified and what subsequent proceedings took place? Can you agree on that?

MR. FARESE:
[14] Your Honor, I think we can prove that in a very few moments.

THE COURT:
Very well. I do commend counsel on what you have been able to stipulate.

MR. HICKMAN:
One further indulgence, Your Honor.

THE COURT:
All right.

MR. FARESE:
Your Honor, Counsel directs my attention to the fact that this pay is predicated on a twelve-month basis.

THE COURT:
All right.
Now, is the rule invoked?

MR. FARESE:
Your Honor, we don't care about the rule.

THE COURT:
All right.
Now, if you have subpoenaed witnesses you do not need, you may release them at this time.

MR. FARESE:
Your Honor, in view of the fact that we have agreed that Coach Cook is a competent coach, I had eight football players, some from Mississippi State, some from Delta [15] State. May I ask they be excused?

THE COURT:
They are free to leave if they wish.

MR. FARESE:
Thank you very much.

THE COURT:
Now, do you wish to make opening statements? I think I understand the question.

MR. FARESE:
No, sir.

THE COURT:
Call your first witness.

MR. FARESE:
Your Honor, we would call as an adverse witness Mr. Roger Hudson.

ROGER W. HUDSON,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FARESE:
Q Would you please state your name.
A Roger W. Hudson.
Q Where do you live, Mr. Hudson?
A Calhoun City, Mississippi.
[16] Q Mr. Hudson, what official capacity, if any, do you occupy with the Calhoun County School System?
A I am the Calhoun City Attendance Center principal.
Q Now, in connection with your duties as a principal, do you recommend the hiring of teachers?
A Yes, sir, I do.
Q Under the state law do I understand that you recommend, and then the County Superintendent either approves or disapproves, and then the Board will accept your recommendation unless good cause exists to the contrary?
A That's right.
Q That is a fair interpretation of your duties?
A Yes, sir.
Q Now, you know all three of the plaintiffs in this case?
A Yes, sir.
Q Isn't it a fact that the only reason that they were not employed was because their children attended private school?
A Yes, sir.
Q All right.

Now, this rule or policy, when was this adopted, and by whom?

A The County School Board adopted it in November [17] of '72, I believe.

Q You are positive of that?

A Yes, sir.

Q All right.

A To the best of my knowledge.

Q In November of 1972.

Now, did they call you in there and give you the written policy?

A No, sir. It was not a written policy.

Q All right. Tell me in your own words, what did you understand the policy to be?

A Well, I understood it to be that any teacher teaching in the public schools of Calhoun County who did not have their children in the public schools of Calhoun County or any living out of the county and did not have their child in a public school would not be subject to re-employment — employment or re-employment.

Q Did you understand that this was a blanket policy, that it applied to everyone, black or white —

A Yes, sir. I do.

Q rich, poor —

A Yes, sir.

Q — yellow, green?

A Right.

Q And, of course, since you understood that to be [18] the policy, you have faithfully carried out that policy?

A To the best of my ability, yes, sir.

Q Well, Mr. Hudson, I want to know, did you faithfully carry out that?

A Yes, sir.

Q In every instance?

A Yes, sir.

Q Would you say that before you hired anyone you would have gone into his background?

A Yes, sir.

Q Because as principal it is your duty to check his background, see how many children he has, where he lives, where he has taught school and so forth; that's true, isn't it?

A That's true.

Q And you tell this Court under your oath that you fully adhere to this policy in every respect?

A Yes, sir.

Q All right.

Now, do you know a Mr. and Mrs. Enochs?

A Yes, sir.

Q Do they teach within your school system?

A Yes, sir, they do.

Q They are members of the black race?

A Right.

[19] Q Would you agree with me that they had a child in a school in Atlanta, Georgia?

A Yes, sir.

Q Did you call Mr. and Mrs. Enochs in and tell them that if they didn't put their children in the public schools of Calhoun County that they would not be re-hired?

A This student was —

Q Excuse me, Mr. Hudson. Would you please answer yes or no and then explain it any way you want.

A Yes, sir.

Q All right. Did they put their children in a public school?

A The child was already in a public school.

Q Did you ascertain that?

A Yes, sir, I did.

Q How did you do that?

A By records from the public school.

Q Now, was it a public school or was it an all-black school in Atlanta, Georgia?

A It was a public school in Atlanta, Georgia.

Q How many whites went to that school?

A I do not know that.

Q All right.

Now, do you know a Mr. Hamblin?

A Yes, sir, I do.

[20] Q Does he teach in the public schools of Calhoun County?

A Yes, sir, he does.

Q Does he have children?

A I understand that he does.

Q Wait a minute, Mr. Hudson. Do you know or don't you know?

A Yes, he does. Excuse me.

Q Yes, sir.

A I wasn't trying to —

Q And do these children go to school? Yes or no.

A Yes, sir.

Q What school do they go to?

A Calhoun Academy.

Q Is Calhoun Academy a private school?

A Yes, sir.

Q Then tell the Court why this policy doesn't apply to him.

A It does apply to him. At the time that he was issued a contract his children were not in the private school, they were placed in the private school without my knowledge.

Q Now, excuse me, Mr. Hudson. When you employed Mr. Hamblin, did you ask him if he had any children?

A When I re-employed him? I'm not understanding the question.

[21] Q All right. In other words, he was re-employed?

A Yes, sir.

Q Then he knew the policy, didn't he?

A Yes, sir.

Q And according to your policy, they would not be allowed to teach in Calhoun County unless their children went to the public schools?

A Right.

Q Then when you found out that his children went to the private school, why didn't you dismiss him?

A Well, he was already under contract and it was the —

Q It was the what?

A It was the — I made the same decision with him that I did with these teachers. They were already under contract and they could finish out the year. And so this is the policy with him.

Q But, Mr. Hudson, according to your policy, the children of any such teachers living in Calhoun County would be required to attend the public schools.

A Right.

Q Did you tell Mr. Hamblin that that was your policy and that that was a condition precedent to his being employed?

A The teachers were all aware of that.

[22] Q All right. Then if he sent his children to a private school, why wasn't he dismissed?

A I just learned it.

THE COURT:

At the time he was issued the re-employment contract, were the children in the public schools?

THE WITNESS:

Yes, sir, to the best of my knowledge, yes, sir.

THE COURT:

And do you now understand that since then they have been placed in the private schools?

THE WITNESS:

Right.

MR. FARESE:

Q Now, when did you issue his contract?

A Well, that is issued from the county. I believe it was in April.

Q You recommended him?

A Yes, sir.

Q You hired him from the first instance?

A Yes, sir.

Q Now, at the time you employed him, what were the ages of his children?

A I don't know.

Q You mean you don't know how old his children are?

[23] A No, sir. We have about sixty-five or seventy teachers on our — in our employment, and I do not know the ages of all the children.

Q Mr. Hudson, how big is Calhoun City?

A Population?

Q Yes, sir.

A Around two thousand.

Q Don't you know every teacher?

A Yes, sir.

Q And you know what their family consists of?

A Yes, sir.

Q And you are going to tell the Court you don't know what ages these children were, approximately?

A Well, they were of school age. Two of them I am sure were of school age. I'm sorry, sir, but I could not —

Q When did you find out they were going to a private school?

A About a week ago.

Q Only a week ago?

A Yes, sir, only a week ago.

Q Did you talk to them and tell them to pull their children out of the private school?

A We told him that he would be under the same regulation as these other teachers.

[24] Q That is not answering my question, Mr. Hudson. If you would, please, sir, answer my question and then explain it. Did you tell him that he would have to pull his children out of the private school if he wanted to continue to teach?

A Yes, sir.

Q Has he pulled them out of the private school?

A I don't know.

Q Now, Mr. Hudson, you are principal. You have told the teacher that he has to pull his children out, and you don't know whether he has done that or not?

A No, sir.

Q All right.

Now, you said that they went to a public school last year.

A Yes, sir.

Q Are you sure of that?

A I was — they went to a school — Magnolia School for the Deaf in Jackson, and that is a public school.

THE COURT:

Do these children have a deaf problem?

THE WITNESS:

Yes, sir. They are seriously —

THE COURT:

Seriously deaf?

[25] THE WITNESS:

Yes, sir.

THE COURT:

All of them?

THE WITNESS:

Yes, sir. The two that are in school. There is a little boy that is not in school yet, I don't know his age, though.

THE COURT:

All right.

THE WITNESS:

But he is not of school age. And he has the hearing problem also.

THE COURT:

All right.

MR. FARESE:

All right.

Q Now, when you say that, are you trying to tell the Court that there are exceptions to your rules?

A No, sir.

Q It doesn't matter if they have a hearing problem?

A Not in this case, no, sir.

Q And it didn't matter if they were not mentally alert or had some defect in hearing, right?

[26] A Right.

Q The rule was absolute and inviolate, right?

A Yes, sir.

Q All right.

Now, Mr. Hudson, assume that a teacher came and applied for a position with the Calhoun County Public School System, and assume that this teacher were a Catholic and wanted to send his or her child to a parochial school. You know what a parochial school is?

A Yes, sir.

Q It's a private school, isn't it?

A Yes, sir.

Q What would be your policy about these teachers?

A The same as —

Q All right.

Assuming that a teacher would come there and wanted to send his child or her child to a Lutheran school, a sectarian school. Would your policy still be applicable?

A Yes, sir.

Q In other words, it makes no difference, if they teach in the public school system of Calhoun County, they have got to send their children to public school, right?

A Yes, sir.

Q That is your policy?

A Yes, sir.

[27] Q Now, as an educator, do you consider this a wise and sound policy?

A Yes, sir, I do.

Q Do you believe that people have a Constitutional right to send their child to any school?

A I believe that they have a right —

MR. HICKMAN:

Your Honor, we object; that is a legal question, whether they have a right to send them to a —

THE COURT:

Sustained. That is legal. Make it factual.

MR. FARESE:

Q Do you agree with the policy that was adopted, as an educator?

A Yes, sir.

Q Now, let's talk a little about your school system. You know the grades and the subjects that these teachers have taught, don't you?

A Yes, sir.

Q Now, will you tell the Court, what is the condition or position of your school relative to teachers now? Do you lack any teachers?

A No, we have our faculty.

Q You have your full faculty?

A Yes, sir.

[28] Q Are they all qualified to teach the subjects to which they have been assigned?

A Yes, sir.

Q If you know, tell the Court why this policy was adopted.

A Because we felt that the — in order to carry out the regulations of this Court in regard to the court order that we are operating under, we are directed to do everything that we can to promote the unitary system and to make it work to the best benefit of all people. And we feel that if a teacher had divided loyalties that her efficiency, productivity, is not going to — is definitely going to be affected.

Q So you assume that because a teacher teaches in the public school system and he or she sent his or her children to a sectarian or secular school for religious training that this would still affect the public schools of Calhoun County?

A Yes, sir, I do.

Q You do?

A Yes, sir.

Q You honestly believe that?

A Yes, sir.

Q Are you advised as an educator that some teachers want their children to have some religious training?

A Yes, sir.

[29] Q And you believe that your policy is valid and justified even though it would deprive this teacher's children of going to a religious school?

A If they are in the public school, yes, sir.

THE COURT:

Well, now, in Calhoun County, do you have private religious schools?

THE WITNESS:

No, sir.

MR. FARESE:

All right.

Q Do you know whether or not in the private school in Calhoun County religion is taught in any way?

A I do not.

Q You won't say it isn't?

A No, I don't know their curriculum.

THE COURT:

What are the private schools in Calhoun County?

THE WITNESS:

We only have one.

THE COURT:

When was it created?

THE WITNESS:

I'm sorry, sir, I don't know the dates.

THE COURT:

[30] All right. That will come out later, I am sure.

MR. FARESE:

Q Now, Mr. Hudson, did you ever reduce this policy to writing?

A I don't believe it was ever reduced to writing. The — that would have been the County Board's position to do that, as I understand it.

Q Mr. Hudson, my question is, did you ever put this in writing?

A No, sir, I said I did not.

Q Did you ever advise the teachers in writing?

A No, sir. It was common knowledge, of course.

Q Now, you say that the reason was to carry out the spirit and intent of the orders of this Court. Have you been doing that faithfully?

A I have certainly tried to, yes, sir.

Q Now, are you aware of the fact that the orders of this Court provided that there would be no segregation in the schools or in the classes?

A Yes, sir.

Q Have you been faithfully carrying out those orders?

A Yes, sir.

Q Then pray tell me and tell the Court why some of your classes are eighty and eighty-five per cent white?

[31] A They are not.

THE COURT:
Now, is that material to this hearing?

THE WITNESS:
They are not, sir.

MR. FARESE:
Well, Your Honor, only to this extent. He says that the real reason is to carry out the intent —

THE COURT:
All right. I will let him answer.

THE WITNESS:
Thank you, sir. We have some — in high school, for instance, in our trigonometry class, it is all white.

MR. FARESE:
Exc ıse me, Your Honor. I will withdraw the question.

Q You will agree just as a flat statement —

A We are under a court order right now, sir, that we have to have a certain percentage. And we have worked that out.

Q A certain percentage of what?

A Of black and white ratio in each classroom.

Q You have that in your court order?

A I may need some help on this.

MR. HICKMAN:
[32] Your Honor, we think this. As I say, he is going far afield.

THE COURT:
Are you objecting?

MR. HICKMAN:
We object.

THE COURT:
Sustained.

THE WITNESS:
But for the county —

THE COURT:
That is all right. Let him go on.

MR. FARESE:

Q So, then, for the purpose of the record, Mr. Hudson, didn't you tell me that this policy was adopted in November?

A Yes, sir.

Q You are sure of that?

A Yes, sir.

Q Then why did you in July tell these teachers that they would not be employed?

A I told them that it was a policy that was being considered and that unless conditions changed, the County Board was discussing it, they had been knocking it around for some time —

[33] Q Wait a minute, Mr. Hudson. You operate under the rules and regulations of the County School Board, don't you?

A Yes, sir.

Q They had not adopted this policy either verbally or in writing, had they?

A No, sir.

Q Then what right did you have to put a condition on the re-employment of these teachers when no such policy or rule had been adopted at that time?

MR. HICKMAN:

Your Honor, we object. He hasn't testified that he created any such right. He just advised of the possibility of a policy that was being considered by the Board.

MR. FARESE:

May it please the Court —

MR. HICKMAN:

In July of '72.

MR. FARESE:

— he told them in July of '72 that they would not be rehired unless they took their children out of the public schools.

MR. HICKMAN:

Your Honor, there has been no testimony — Counsel is using the word "re-hired." We have agreed to the [34] policy stated. It's simply that the children of a teacher that lives in Calhoun County and teaches in the public school system, if they do not send their children to the public schools, they will not be recommended for re-employment. There is nothing said about dismissal. The policy doesn't say anything about dismissal.

THE COURT:

I understand.

Let me ask you if there was any dispute but that this policy was agreed on in November, 1972. Is there any dispute about that?

MR. HICKMAN:

We are not disputing it.

THE COURT:

All right.

MR. FARESE:

Q So that the School Board adopted the policy in November of '72. But you told the teachers in July of '72, didn't you?

A Yes, sir.

THE COURT:

Now, was that the first notice that the teachers had?

THE WITNESS:

Yes, sir.

[35] THE COURT:

Why did you wait so long if you were going to be —

THE WITNESS:

Well, I — you see, this was my first year as attendance center principal, and I came on officially the first day of July.

THE COURT:
Of this year?

THE WITNESS:
Of this year we are talking about, '72, yes, sir.

MR. FARESE:
Your Honor, to clarify the record:

Q When you told the teachers in July, you told them in July of 1972, before the School Board had formally adopted its order in November of '72.

A Yes, sir. Yes, sir, I agree with that.

Q All right.

Now, who was the principal before you went there?

A Mr. D. L. Harrison.

Q How long had he been principal?

A Thirty-six years.

Q Would it be fair to say that this court order integrating the schools of Calhoun County was adopted in 1966?

[36] You are advised of that, right?

A Was it '66 or '68?

Q Well, I am going to come to '69. The original order was in '66 and a supplemental order in '69.

Would you agree to that, Counsel?

THE COURT:
The Court will take judicial notice.

THE WITNESS:
That's a question I don't know.

MR. HICKMAN:
Your Honor, the record speaks for itself.

THE COURT:
Yes, sir.

MR. FARESE:
All right.

Q Now, at that time, in '69, '70 and '71, who was principal of the school?

A Mr. D. L. Harrison.

Q Now, during that period of time these teachers had their children in private school, didn't they?

A One of them did.

Q Well, one of them. And nothing was said during that tenure, was it?

A To my knowledge, no, sir.

Q And you knew when you were appointed principal [37] that these teachers had been allowed the right to have their children —

MR. HICKMAN:
Your Honor, we object to this line of testimony. This is just based solely on the policy that this Board has adopted, not what has happened prior to this time. We think that is immaterial and irrelevant.

MR. FARESE:
We want to know the reason for the adoption of this policy. If the school system was operating perfectly all right, why was it necessary —

MR. HICKMAN:
He has already testified as an educator as to what he thought was proper —

THE COURT:
I will allow it. Let's see how it comes out.

MR. FARESE:
All right.

THE COURT:
One of the teachers did have children in the private school at the time you first came there?

THE WITNESS:
Yes, sir.

THE COURT:
Who was that teacher?

[38] THE WITNESS:
Mrs. Wright.

THE COURT:
All right.

MR. FARESE:
Q Well, when you came there, other teachers had children in private schools, too, didn't they?
A I believe one other, yes, sir. One other besides Mrs. Wright.
Q And that had been going on prior to your taking on the job as principal?
A Yes, sir.
Q Mr. Hudson, I believe you have stated that as an educator and especially as a principal that it is your opinion that a teacher who teaches in a public school system ought to be required to send their children to the public schools, right?

A Yes, sir.
Q Are you aware of the policies adopted by school systems, say, in Memphis, Tennessee, and in large metropolitan areas where teachers are not employed if their children are going to the same school? Are you advised of that?
A I didn't understand the question. Now, where the — just repeat the question, if you don't mind, sir.

MR. FARESE:
[38 Original Record numbered Incorrectly] A All right.

MR. HICKMAN:
Your Honor, we object to this line of questioning. As far as talking about Memphis. We are talking about Calhoun County.

THE COURT:
Well, I will allow it. He is an adverse witness.
You might make it a little clearer question, though.

MR. FARESE:
Q You are an educator?
A Yes, sir.
Q Are you aware of the fact that in some metropolitan areas — you know what I mean by metropolitan?
A Sure.
Q Large areas. — that the school system adopts a policy that a teacher will not be employed if the child is going to the same school?
A Yes, sir, yes, sir.

MR. HICKMAN:
Your Honor, we object. It has not been established the fact that these schools —

MR. FARESE:
He said —

[39] MR. HICKMAN:
We must make this —

THE WITNESS:
I —

MR. HICKMAN:
We must object to that.

THE COURT:
Well, counsel has —

THE WITNESS:
I believe there are such places.

MR. FARESE:
Q You know what we are talking about?
A I believe there are such places.
Q If they are employed at, say —
A Central High and their children are going to Calloway —
Q That's all right?
A That's all right, yes, sir.
Q That's right. And you are aware of that, aren't you?

A Yes, sir.
Q Do you know that this is a good educational policy?
A I see nothing wrong with it.
Q All right. But it does conflict with your [40] policy, doesn't it?
A No, sir.
Q Oh, well, why doesn't it?
A They are in the same school system.

THE COURT:
They are in different public schools?

THE WITNESS:
Yes, sir.

THE COURT:
That is the point he is making.

THE WITNESS:
I am making — they are in the same school system, working toward the same goal.

MR. FARESE:
All right.
Q But you still will not retreat from your position that even if they wanted to go to a parochial or a church school that your policy is inviolate in that respect?
A Yes, sir.
Q They would be deprived of that right, right?
A (Moving head up and down)

MR. FARESE:
All right.
I have no further questions of this witness.

MR. HICKMAN:
[41] We have no questions at this time.

THE COURT:
All right.
You may stand down. Call your next witness.

MISS JONES:
Your Honor, we call Mrs. Adams, a plaintiff.

LOULA JUANITA MILTON ADAMS,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS JONES:
Q Mrs. Adams, you are one of the plaintiffs in this cause, is that correct?
A Yes.
Q We stipulated to quite a bit, so I will try to make this brief and just ask you a few questions.
What does your husband do?
A At present, he is going to school at Ole Miss.
Q What did he do last year?
A He taught school.
Q Where did he teach?
A Last year, he taught at Grenada Lake Academy.

THE COURT:
Speak out just a little louder, please.

[42] THE WITNESS:
All right, sir.

THE COURT:
Where did he teach last year?

THE WITNESS:
Grenada Lake Academy.

THE COURT:
All right.

MISS JONES:
Q How many children do you have?
A Two.
Q What are their ages?
A My little boy is six and my little girl is four.
Q All right.
Where does the six-year-old go to school?
A Calhoun Academy.
Q Is that a private school or public school?
A It is a private school.
Q And why are you sending him there?
A We chose to send our child to the private school for several reasons, the first of which is because he has an enunciation defect. He has trouble saying words properly. And we felt that he would be better off in a calmer situation where he could get individual attention.

Q Any other reasons?

[43] A Yes. He can get some religious training there, which we feel is very important in the child's life.

Q In the public school, do they allow you to teach any kind of religion?

A No, not to my knowledge.

Q All right.

Mrs. Adams, during the 1972-73 school year you were employed by the public school in Calhoun County, is that correct?

A That is correct.

Q All right.

Did you perform your duties as a teacher during that year?

A Yes, I did.

Q All right.

What differences, if any, were there in the manner in which you performed your duties that year and the year before?

A I would say that they were somewhat better because I had had more experience.

Q The year before, was your child in the public school?

A My child was not in school the year before.

THE COURT:

Your child has just enrolled in the second grade?

[44] THE WITNESS:

Yes, sir.

MISS JONES:

Q Any other differences that you know of?

A I can think of none.

Q Mrs. Adams, how did your failure to get rehired affect your personal or professional life?

A My personal life, it has made me quite nervous as to what I would do to help earn money for my family, because, as you know, my husband is in school. My professional reputation has been damaged because it would be very difficult for me to get a job now teaching school.

[44] MR. HICKMAN:

Your Honor, we object. That's a conclusion on her part.

MISS JONES:

Q Have you had any difficulty getting work?

A Yes, I have. When I found that I would not be rehired for this school year, we called — my husband and I called a principal in Laurel, where we had previously taught —

MR. HICKMAN:

Your Honor, we object to what her husband did. She may testify what she did.

THE COURT:

[45] What you did. What efforts did you make to get other employment? That is the question, I think.

MISS JONES:

Q What efforts did you make personally to obtain another job in a teaching position? Did you make application anywhere or try to make application anywhere?

A Yes, I wrote for applications.

Q Where?

A From Jones County, in Laurel.

Q Were you —

A I was not sent an application.

THE COURT:

Was that a public school you applied to?

THE WITNESS:

Yes, sir.

MISS JONES:

I'm not sure whether you answered fully. You mentioned about your child having a speech defect.

Q Did you give that as a reason for sending him to private school?

A Yes.

Q Why do you say that as a reason?

A He does not enunciate his words properly and, therefore, he needs to be in a calmer situation. This was advised to us by a speech pathologist at the University of [46] Tennessee. And he needs individual attention to help correct this problem.

Q Mrs. Adams, the fact that your child goes to private school, did you think it might ever affect your teaching abilities in the public school system?

A No, I did not.

Q Did it affect you —

A No, it did not.

MR. HICKMAN:

Your Honor, I object.

THE COURT:

I sustain the objection.

MISS JONES:

Your Honor, he said one of the main reasons for adopting the policy was to prohibit the divided loyalties —

THE COURT:

All right, I will allow it. Anything else?

MISS JONES:

We have no further questions.

THE COURT:

You may cross examine.

CROSS EXAMINATION

BY MR. HICKMAN:

Q Mrs. Adams, when did you first begin teaching in [47] Calhoun County?

A Two years ago.

Q And I believe you taught two years.

A Yes, sir.

Q And do you recall when the Calhoun Academy was established?

A No, sir, I do not.

Q Was it in operation when you began teaching in Calhoun County schools?

A Yes, it was.

Q Where is your home?

A Booneville, Mississippi.

Q And you have been in Calhoun County only two years? How long have you been in Calhoun County?

A We moved to Calhoun County three years ago.

Q All right. The academy was there three years ago, was it not, in operation?

A Yes, sir.

Q Now —

A I — may I say something, Your Honor?

THE COURT:
Yes.

MR. HICKMAN:
I believe that you —

THE COURT:
[48] Just a moment. She had something else she wanted to add.

THE WITNESS:
He asked me if the Calhoun Academy was in operation three years ago. I do not know.

THE COURT:
All right.

THE WITNESS:
I only know for two years ago.

THE COURT:
All right.

MR. HICKMAN:
All right.

Q I believe you testified that you have one child that attends the academy.

A Yes, sir.

Q And that your child has a speech impediment.

A Yes, sir.

Q Now, Mrs. Adams, is it not true that the Calhoun County School has a speech therapist?

A Yes, sir.

Q And is it not true that this is the type of problem that a speech therapist deals with?

A Not necessarily, sir.

Q A speech therapist does not concern himself with [49] problems of speech in a child?

A Yes, a speech therapist does do that. But not necessarily in this particular case.

Q Well, that is your conclusion.

A Yes, sir.

Q Now, did the private school have a speech therapist?

A No, sir.

Q Didn't have a speech therapist, did it?

A No, sir.

Q Now, the speech therapist in the Calhoun County School, was it white or black?

A I do not know.

Q You do not know whether the speech therapist — what color the speech therapist was?

A No, sir.

Q Do you know the names of the speech therapists in the Calhoun County Schools?

A No, sir, I do not.

Q When you taught in the Calhoun County Schools, did they have a speech therapist?

A I believe they had one that was available from the University of Mississippi.

Q All right. Did you consult with this one that was available in regard to this problem that you had with [50] your child?

A No, sir.

Q Did you make any inquiry in the Calhoun County Schools of the availability of a speech teacher?

A No, sir.

MR. FARESE:

Now, may it please the Court, we are going to object to this line of questioning for the reason this witness has stated that was her reason. Her reasons are her own Constitutionally, God-given reasons to send her child to that school.

THE COURT:

Overruled.

MR. HICKMAN:

May I just say in response, if it please the Court, that we are not concerned about the rights for the children —

THE COURT:

The Court has ruled. Put your next question.

MR. HICKMAN:

All right.

Q Now, how is your child receiving training for this speech impediment in this private school with no speech therapist?

A He does not have particular training but he has [51] a calmer environment with fewer in the classroom.

Q Well, then you are now saying that the child does not have a speech impediment?

A No, sir, I am not saying that.

Q All right.

Well, then, did you talk with the officials at the Calhoun Academy prior to your entering your child?

A I don't understand —

Q Well, did you go to the academy and talk with the officials about the problems of your child, the speech impediment?

A Yes, sir.

Q Who did you talk with?

A I talked with the person who was taking applications.

Q All right. Who was taking those applications, Mrs. Adams?

A At that time, Mrs. VanLandingham.

Q All right.

Now, did you ask did they have a speech therapist or something?

A No, sir; I knew they did not.

Q In other words, you knew when you took your child that they didn't have a speech therapist, didn't you?

A Yes, sir.

[52] Q Now, Mrs. Adams, how many contacts did you make in regard to employment? You personally.

A Two.

Q And how were these contacts made?

A I wrote a letter to Jones County Schools.

Q Did you receive a reply?

A No, sir.

Q You did not receive a reply?

A No, sir.

Q Did you follow up in any way on that?

A Not at that particular time, no, sir.

Q Well, at a later time, did you follow up?

A No, sir, I have not yet.

Q All right. And you just wrote one letter?

A Yes, sir.

Q Now, who did you write that letter to?

A I addressed it to the Jones County Schools.

Q Just to the Jones County Schools? I mean, you addressed it just to Jones County Schools?

A Sir, I don't understand.

Q Well, I am trying to determine from whom you sought an application or made inquiry to about employment.

A Oh, I understand. I'm sorry. I addressed it to Mr. Gerald Grayson.

Q Mr. Gerald Grayson?

[53] A Grayson.

Q And Mr. Grayson did not reply to your letter?

A No, sir.

Q Now, when was that letter written?

A Sir, I don't remember. It was sometime in May.

Q Sometime —

A In May.

Q — in May?

A Yes, sir.

Q Of —

A Of this year.

Q Of this year? All right.

Now, what other inquiry did you make, if any?

A Personally?

Q Personally.

A I can't testify as to what my husband did, is that right, sir?

Q I just said personally.

A No, sir.

MR. FARESE:

If it please the court, if she tried to obtain employment through the efforts of her husband, I think this is the line of questioning he is trying to ask her and I think she ought to be allowed to testify.

THE COURT:

[54] Well, I think he wants her personal efforts.

MR. HICKMAN:

That's what I'm trying to show.

THE COURT:

You can put the husband on to show what efforts he made.

MR. HICKMAN:

Q Now, just to bring this to a halt, is the only personal contact you made the one letter in May?

A Yes, sir. In May of '73.

Your Honor, was that for teaching employment?

THE COURT:

She wants to know if that was teaching employment or any employment.

MR. HICKMAN:

Well, any employment.

Q The one letter in May was for teaching employment?

A Yes, sir.

Q Now, what about inquiries you made about other employment?

A I did talk with some about other types of employment.

Q All right. Let's begin with the first one you talked with. When did you talk with them?

[55] A Well, I talked with the company in which I am now employed.

MR. FARESE:

Your Honor, may it please the Court I am going to object to this line of questioning. I don't think it's relevant to this lawsuit.

THE COURT:

Have not you stipulated she is now working?

MR. FARESE:

Yes, sir.

THE COURT:

As a part-time secretary, Seventy-Four Dollars a week.

MR. HICKMAN:

That's correct.

MR. FARESE:

Yes, sir.

MR. HICKMAN:

But as I understand, Your Honor, we have cases which have indicated that she is under an obligation to mitigate, to seek employment —

THE COURT:

Well, she has employment at this time.

MR. HICKMAN:

Yes, sir. But I am trying to determine what she [56] did between the time she did not have employment and until she obtained it as to whether she made an effort to obtain employment.

THE COURT:

Well, can you do that briefly?

THE WITNESS:

May I tell him something?

THE COURT:
Yes, you may.

THE WITNESS:
Would it be simpler?

THE COURT:
All right.

THE WITNESS:
From the time that I found out for sure that I would not be employed for this next year —

THE COURT:
Now, when was it you found that out?

THE WITNESS:
It was approximately two weeks before school was out, and I believe school was out on the 19th of May.

THE COURT:
All right.

THE WITNESS:
I was unemployed one week after school was out [57] and then I had a job.

MR. HICKMAN:
Q Now, is that the job that you presently have?
A Yes, sir.

MR. HICKMAN:
All right.
I believe that's all.

THE COURT:
Mrs. Adams, are you a member of a church?

THE WITNESS:
Yes, sir.

THE COURT:
What is your religion?

THE WITNESS:
Baptist.

THE COURT:
All right.
What is your husband's religion?

THE WITNESS:
He is a Baptist. He is also an ordained minister.

THE COURT:
I see.
And does the Baptist denomination have a private religious school in Calhoun County?

THE WITNESS:
[58] No, sir.

THE COURT:
Did you make inquiry as to whether the Calhoun Academy is a religious school?

THE WITNESS:
It is not a religious school.

THE COURT:
It is a secular school?

THE WITNESS:
Yes, sir.

THE COURT:
All right.
Any redirect?

MISS JONES:
Yes, sir.

REDIRECT EXAMINATION

BY MISS JONES:
Q Do you know whether the private school does indulge in any religious activity?
A I know that they have devotionals and story hours involving Bibles stories, yes.
Q Do you approve or disapprove of that?
A I approve.
Q Mrs. Adams, before you sent your son to private [59] school, did you consult with his doctor?
A About his speech problem?

Q About whether or not you should send him to a public or private school in Calhoun County.
A Yes.
Your Honor, may I ask her a question?

THE COURT:
All right.

THE WITNESS:
I did, but not the year before. I had done it while he was still having most of this problem in enunciation. Now, he still has a definite enunciation problem, but we had consulted with this doctor and he told us to keep him —

MR. HICKMAN:
Your Honor, we object to hearsay.

THE COURT:
Sustained.

MR. HICKMAN:
This is repetitious. And she is outside the scope of redirect.

MISS JONES:
Well, could I ask this question, then?
Q Did you send him to the private school for therapy or for a better environment?

MR. HICKMAN:
[60] Your Honor, this is again outside the scope of redirect. She has testified —

THE COURT:
Well, I will allow her to answer.

THE WITNESS:
For environment and for individual attention. Because they have smaller classes.

MISS JONES:
All right.
Q Mrs. Adams, what efforts toward obtaining a teaching position after you were not re-hired did you make other than through your own efforts?
A My husband inquired for an application —

MR. HICKMAN:
Your Honor, we again object to what her husband did. We think all she can testify is what she did personally.

THE COURT:
Well, technically that may be true, but is there any harm in the Court receiving this evidence? I see no harm in receiving the evidence.
What inquiry did your husband make?

THE WITNESS:
He obtained for me an application from the Lafayette County Schools.

MISS JONES:
[61] Q Did you make an application?
A I filled it in, but since I was employed the day after I filled it in, I did not mail it.

THE COURT:
All right.

MISS JONES:
Just one last question, Mrs. Adams.
Q Did the Board of Education of Calhoun Public Schools ask you any questions about your child's physical problems before they told you that you were not going to be re-hired?
A No, they did not.

MISS JONES:
That's all I have, Your Honor.

RECROSS EXAMINATION

BY MR. HICKMAN:
Q I believe you have now stated that you did receive an application from the Lafayette County High School.
A Yes, sir.
Q Your husband, you say, requested an application.
A Yes, sir, and he brought it to me.
Q Which indicated some interest by them sending you an application, did it not?
A Yes, sir.
[62] Q But you didn't —
A But all — may I say this?
Q Yes.
A All he did was request an application for me.
Q All right. But you did not complete that application, did you?

A I filled it in, yes, sir.

Q But you did not mail it?

A I did not mail it because the day after I got it, filled it in, I was employed.

Q And you were employed at, I believe, Seventy-Four Dollars a week.

A Yes, sir.

Q Had you been employed at Lafayette County Schools, it would have been a substantial amount in excess of that, wouldn't it?

A I should hope so.

THE COURT:

Mrs. Adams, when you were told that you would not be re-employed, in early May, unless your child went to public school, did you advise the principal that your child had a special physical problem?

THE WITNESS:

No, sir.

THE COURT:

[63] You did not?

THE WITNESS:

No, sir.

THE COURT:

You did not ask for a hearing on that ground before him or the School Board?

THE WITNESS:

No, sir.

THE COURT:

All right.

You may stand down.

Who do you have next?

MISS JONES:

Your Honor, we will call Coach Billy Cook.

BILLY COOK,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS JONES:

Q Coach Cook, you are Billy Cook, one of the plaintiffs in this case, is that correct?

A Yes, ma'am.

Q All right.

Coach, what did your wife do during the 1972-73 [64] school year?

A My wife was employed as a teacher's aide at Calhoun City Attendance Center. And I was employed as teacher-coach, also at Calhoun City Attendance Center.

Q So you were both employed by the public schools?

A Yes, ma'am.

Q Do you have any children?

A I have two. I have a little boy seven and a little girl five.

Q With regard to your seven-year-old, where did he attend school during the 72-73 school year?

A He attended Calhoun Academy.

Q Why did he go there?

A Well, we thought Rod was a very emotional, nervous-type person and we thought that in an environment where there were small classes that he would be better off there. And I always think that a child away from his parents would be much better off. In other words, I would not show any partiality toward him if he was involved in the school that I was teaching at.

Q What ill effects, if any, do you feel there would be or there are when your child goes to the same school where you teach?

MR. HICKMAN:

This calls for a conclusion, please the Court. [65] We object.

MISS JONES:

May it please the Court, I think he is qualified as an educator. We have stipulated he has eight years of experience, he and his wife both teach at the Calhoun Public School and they have had experience in this area.

THE COURT:

All right. Overrule the objection.

You may answer.

THE WITNESS:

Would you ask the question again, please?

MISS JONES:

Q What ill effects do you think there are, in your

opinion, when your child goes to the same school where you and perhaps your wife also are teaching?

A I feel like that any teacher will show partiality to their own child, especially if they are involved in class-room or on campus when someone gets in a fight. You are sure going to say, — well, you are going to protect your own before you will someone else's.

Q Coach, in your position as a coach, are you more or less subject to public opinion than other teachers?

A I am more so subject to it.

THE COURT:

What age children do you teach, Coach?

[66] THE WITNESS:

I teach high school students.

THE COURT:

High school only?

THE WITNESS:

High school only.

THE COURT:

And Mrs. Cook, she is a teacher's aide?

THE WITNESS:

Yes, sir.

THE COURT:

What age —

THE WITNESS:
She had one through five.

THE COURT:
As a teacher's aide, does she have charge of them during recess periods?

THE WITNESS:
She was on duty at recess, yes, sir.

THE COURT:
No instruction, though?

THE WITNESS:
No instruction.

THE COURT:
All right.

[67] MISS JONES:
Q What grade does your wife teach?
A She was in the reading program, she had different grades at different times, a certain period of time in a day.
Q Coach, during the 72-73 school year, did you perform your duties as a teacher and a coach?
A Yes, ma'am.
Q Did you perform them any differently in the 72-73 year, when your child was in private school, than you did the year before?
A I feel like any teacher that gains a year's experience is much better off each year he teaches. And I

felt like that I had done a tremendous job under the conditions which I taught.
Q All right, sir.
How has your failure to get re-hired at the Calhoun Public School affected your personal and professional life, if it has?
A I will have no alternative to probably ever coach again as far as high school caliber is concerned.
Q Why do you say that?
A It's just affected me —

MR. HICKMAN:
Your Honor, that is a conclusion.

[68] MISS JONES:
Your Honor, he ought to know why he says what he says.

THE COURT:
It is his opinion. Of course, he could be wrong, but I will receive it.

THE WITNESS:
When you look at a group of boys and they see how a coach is treated as far as the situation which I occurred in, it discourages you in front of a group of boys which you have to compete before in competition and in athletics and I feel like that it has damaged me a great deal. I don't have that incentive that I used to have towards coaching.

MISS JONES:
All right, sir.
Will the Court indulge us?

THE COURT:
All right.

MISS JONES:
Q Coach, prior to beginning your teaching degree and during your own high school and college days, did you engage in athletics at all?
A Yes, ma'am. I was a graduate of Eupora High School, where I was an outstanding athlete, attended [69] Mississippi State University, where I lettered as a freshman, and a three-year letterman on the varsity squad at Mississippi State University.
Q Coach, do you know Mr. Hudson?
A Yes, ma'am.
Q What is his first name, Roger?
A Roger.
Q Coach, was there any animosity between you and Mr. Hudson while you were teaching at Calhoun County Public School?
A The only incident as far as any disagreement as far as Mr. Hudson is concerned would be over the issue as far as my child is concerned.
Q Was there ever any animosity between you and Mr. Burt?
A No, ma'am, other than he being opposing coach while he was coaching at Vardaman. Now, I don't know whether any exists there or not.
Q Coach, let me see if I can ask this another way. Was anything ever done while you were teaching at the public school system in Calhoun County —

MR. HICKMAN:
Your Honor, we object. We have stipulated as to why he was not recommended.

THE COURT:
[70] I do not see the materiality of any animosity that existed.

MR. FARESE:
If it please the Court, we want to prove that the policy was adopted not for what they said but for the reason that Mr. Hudson wanted to get rid of this man. And we want to point out to the Court the reason why he wanted to get rid of him.

THE COURT:
All right. On the basis of that, I will let you go into it.

MISS JONES:
Q Mr. Cook, did you teach in the Calhoun County High School during the summer of 1972?
A No, ma'am.
Q Did anyone teach under your certificate?
A Yes, ma'am.
Q Who?
A Mr. Roger Hudson.
Q Would you tell us about that and how that took place?
A When this allegation was made that I would not be re-hired, I was informed that he taught under my certificate. And it was in the office at Jackson, Mississippi, the Superintendent of Education there. I ac-

quired a copy and [71] carried it to Mr. Hudson on the eve of my dismissal, sometime around February.

THE COURT:
February of this year?

THE WITNESS:
Yes, sir.

THE COURT:
You were dismissed then?

THE WITNESS:
Well, that was about the fourth or fifth time I was told that I would be dismissed.

THE COURT:
I see. All right.

THE WITNESS:
And showed it to Mr. Hudson and said, "Now, here you have used my name and accepted money under my name for teaching a class which I did not teach."
And he said, "Hold off, let me talk to the Board about it. You have something."
Around February 19th, he come back and said the local board had chose to dismiss me —

MISS JONES:
Excuse me.
Q You said that was around February the 19th?
A Yes, ma'am, somewhere thereabout.

[72] Q All right.
And do you know whether at that time Mr. Hudson had been re-hired?
A No, ma'am, he had not been re-hired.
Q All right.
After you confronted him with this, what did he say to you?

THE COURT:
Well, now, is not this going against your stipulation? Are not you saying that the only reason for the dismissal of these teachers was the fact that they did not comply with the policy?

MR. HICKMAN:
That's what —

MISS JONES:
Your Honor, the stipulation relates to the punitive damages, as I understand it. We specifically discussed this and it was understood that we would be able to bring this out to challenge —

THE COURT:
I thought you were putting to the Court the reasonableness or Constitutionality of the regulations.

MR. FARESE:
Yes, sir. But going to the reasonableness and Constitutionality of the adopted policy, we want to show that [73] this man was one of the principal instigators in that policy and that one of the prime reasons was to

get rid of Coach Billy Cook because of this evidence that he had at that time showing that this man had taught under his certificate.

MR. HICKMAN:
This is all after the fact. This is after the fact, after the fact of the policy. I mean, this —

THE COURT:
The Board adopted the regulation in November of 1972.

MR. HICKMAN:
Yes, sir. This would have been after that.

MISS JONES:
Your Honor, we are talking about the summer school session in 1972.

THE COURT:
I understand what you are talking about. I do not see exactly, unless his case is different from the others, why you are going into this.

MISS JONES:
Well, Your Honor, I think, of course, as they have aptly set forth, they are not real sure when they adopted this policy exactly.

THE COURT:
Well, I will let you go into it, then, but it [74] seems to me like you are getting a little off the track.

MISS JONES:
Could I have this marked as an exhibit for identification?

THE COURT:
All right.

THE CLERK:
Plaintiffs' Exhibit Number One for identification.

MISS JONES:
Q Coach, you have been handed what the Marshal has had marked Exhibit One for the Plaintiffs. Can you identify that?
A Yes, this is a copy of the State Board where he taught under my name.
Q Were you the one who sent off for that?
A Yes, ma'am.

MISS JONES:
We would like to have that introduced in evidence, Your Honor.

THE COURT:
All right. Let it be received.

MR. HICKMAN:
Let the record show we object.

THE COURT:
Overruled.

[75] MISS JONES:
Your Honor, I have no further questions.

THE COURT:
You may cross examine.

CROSS EXAMINATION

BY MR. HICKMAN:
Q Mr. Cook, would you again give me the ages of your children?
A Seven and five, boy being seven, girl five.
Q And then your son is the one that is attending the private academy in —
A Yes, sir.
Q Now, how many children are in his class?
A Twenty-six.
Q Now, how many black children are in the Calhoun Academy?
A None.
Q Now, what is your position at the Calhoun Academy?
A Headmaster and coach.
Q Now, if any black child applied, would they be admitted?
A No, sir.
Q Have any black children ever applied?
[76] A No, sir.

MISS JONES:
Your Honor, I am going to object to that unless he first qualifies whether or not he knows the answer.

MR. HICKMAN:
I think he said he was the headmaster.

THE COURT:
Yes. Overrule the objection.

MR. HICKMAN:
Q Do you know when the Calhoun Academy was established?
A No, sir.
Q How long have you been in Calhoun County?
A I have been there five years.
Q All right.
The academy has been there for the past five years?
A The only time that I recollect there being an academy was when I sent my child there.
Q Now, you taught in the schools in Calhoun County for five years?
A Yes, sir.
Q And during the time that you taught in the public schools, were you familiar that children did go from the public schools to the academy?
[77] A Yes, sir.
Q All right. Do you recall over what period they went from the public schools to the academy?
A No, sir, I sure don't.
Q Now, Calhoun Academy is not a religious school, is it?
A No, sir.
Q Do you know how many students are in the first grade at the Calhoun Public School?
A No, sir.
Q Did you make any effort to determine?

A Now, what are you pertaining to?
Q The number of students in the —
A When, this year or —
Q Well, the year that your child was in the private school.
A I would say they were close to — they were over a hundred, I know.
Q In the first grade?
A Right, sir.
Q All right.
Now, you are not saying that one teacher teaches a hundred?
A No, sir.
Q All right. How many would a teacher teach in the [78] public schools?
A How many have they taught?
Q Well, how many were they teaching when you left Calhoun Public Schools?
A Some classes had at least thirty-five.
Q All right.
And how many did you say were in your —
A Twenty-six.
Q Now, as a general rule, how many are in a class?
A State regulations are no more than twenty-seven.
Q In other words, about the same number by state regulation in the public schools as in your private academy, isn't it, Mr. Cook?
A No, sir.
Q I thought you said state regulations were twenty-seven.
A Twenty-seven is right.

Q All right. And I believe you testified there were twenty-six in your child's class.
A Child's class.
Q So it's about the same, isn't that —
A Not over the whole school, no, sir.
Q But as far as the state regulations are concerned?
A Yes, sir.
Q And generally about the size of a class in [79] Calhoun City Schools, isn't that true, first-grade class? About twenty-seven?
A I don't know about this year.
Q I mean in the past, when —
A No, sir.
Q Some six years that you were there.
A No, sir. No, sir, it was overcrowded.
Q All right.
Now, I believe you taught in high school.
A Right, sir.
Q So, in teaching in high school, you, of course, wouldn't be teaching your son?
A No, sir.
Q Have you ever taught in the elementary school?
A Have I ever been involved —
Q Have you ever taught in elementary school?
A No, sir.
Q So if your son had attended the public schools, you wouldn't have taught your son, would you?
A No, sir.
Q You wouldn't have been associated, really, with your son in the school system?
A I would have been right — I would have been on campus with him, yes, sir.

Q On campus, but not in the classroom?
[80] A No, sir.
Q You and your son are in the same school now, as I understand it.
A Yes, sir.

THE COURT:
Do you find any problems there?

THE WITNESS:
Yes, sir.

THE COURT:
What are they?

MR. HICKMAN:
That's what —

THE COURT:
What problems?

THE WITNESS:
Well, it would probably be — as far as — now, I never have had to do it, Judge, but it would be on punishing.

THE COURT:
All right.

MR. HICKMAN:
Q Well, now, let's develop that a little further. As I understand your testimony, you felt that your child would be better if it was in a school different from the schools you were in.

A Right.
[81] Q And, of course, you and your child are now in the same school.
A Right, sir.
Q Now, how many students were in the Calhoun Public Schools when you left, approximately?
A When I left? I'm not familiar with the number unless you are talking about the first grade.
Q All right. You don't know the total number of students that were —
A No, sir. That was not my responsibility.
Q All right.
How many students do you have in your private academy?
A I have one hundred thirty-eight.
Q You have one hundred thirty-eight students?
A Right.

THE COURT:
That is total enrollment?

THE WITNESS:
Total enrollment, one through nine.

MR. HICKMAN:
Q And that's students from Calhoun County?
A We have some from Webster County.
Q You have some from Webster County?
A Yes, sir. We have some from Pontotoc County.
[82] Q You have some from Pontotoc County. All right.
What other counties?
A That's all.

Q All right.

Now, I believe that you said you coached six years.

A I have coached eight years.

Q Eight years at Calhoun City?

A Five.

Q How many boys the last year that you coached participated in the football program?

A Thirty-two.

Q How many boys were eligible in the school?

A Eligible?

Q Eligible. Come out for athletics.

A I imagine all of them.

Q You don't know how many —

A No, sir, I do not tamper with the grades or the permanent records unless they come out.

Q All right.

And you had approximately thirty-two boys?

A Right.

Q Did you complete the year with about thirty-two boys?

[83] A Yes, sir, exactly thirty-two.

Q Now, tell me exactly the reason you say you send your son to private school.

A We feel like that Rod is a very emotional, nervous-type child. And we thought in an atmosphere where it was a quiet environment that he would possibly — possibly not be erupted emotionally as far as his school work and all is concerned. And he could get special attention also.

Q All right.

Now, does your academy have specialists in these areas?

A No, sir.

Q Speech therapists or —

A They have qualified teachers in the field that they — in the grades that they are teaching.

Q All right. But they don't have the specialists?

A No, sir.

Q All right.

Now, in the Calhoun Public Schools, you do have specialists in areas, don't you, Mr. Cook?

A What area are you referring to?

Q Well, you have a speech therapist?

A Yes, sir.

Q Did you have a guidance counselor?

A Yes, sir.

[84] Q And that guidance counselor counseled with emotional children, isn't that —

A He was for high school only.

Q You didn't have any counsel for the —

A No, sir.

Q — lower groups?

A No, sir. If they did, I didn't know it.

Q All right.

But you don't have any counselor at your present school?

A No, sir.

THE COURT:

Mr. Cook, you have not said you are sending your child to private school for religious reasons, is that so?

THE WITNESS:

No, sir, I'm not sending him because of religious reasons.

THE COURT:
All right. What church are you a member of?

THE WITNESS:
Baptist.

THE COURT:
All right.

MR. HICKMAN:
[85] Q Now, Mr. Cook, what is the condition of your other child? Does she have an emotional problem?
A No, sir.
Q All right. Do you plan to send your other child to a public or private school?
A I think that any parent has the right to send their child where they wish as long as it's paid for, or public or what.
Q Well, then I will ask you again, do you plan to send your child to a public or private school?

MR. FARESE:
Your Honor, we object to that question. We don't believe it's relevant on this issue. What he plans to do in the future.

THE COURT:
How is it relevant?

MR. HICKMAN:
It has been testified, if the Court please, that because of emotional problems, was the reason that he sent this child. We are just trying to establish that if that is the basis —

THE COURT:
All right. I will receive it.
What are your present plans, if you have any?

THE WITNESS:
[86] I don't have any.

THE COURT:
All right.

MR. HICKMAN:
All right.
Q Now, you testified you didn't want your child in the same school you teach in. So when you took the job as head of the private school, why didn't you send your child to another school?

MISS JONES:
Your Honor, I object to that. That's what this whole lawsuit is all about.

THE COURT:
Overruled. It goes to credibility.

MR. HICKMAN:
Q Did you understand the question?
A Ask it, please.
Q You want me to ask it again?
A Yes, sir.
Q Now, you have testified that you didn't want your child in the same school that you taught in.
A Right, sir.
Q And you had reasons for it.

A Right, sir.

Q As you testified. Then why, when you took the [87] job as headmaster at the academy, private academy, didn't you send your son back to the public school or some school where you were not involved?

MR. FARESE:

Now, may it please the Court, we object for this rea-'son. The only reason he is teaching in the private school is that he was compelled to teach in order to secure employment. Now, it would be ridiculous to have this man once he is employed there then turn right around and say, "Well, I am going to send my son to the very school system that deprived me of a chance to make a livelihood."

THE COURT:

Well, overrule the objection. Let's see what he says.

MR. HICKMAN:

If you will answer that.

A Why?

Q Why?

A I felt like that if I sent my child to Calhoun City Attendance Center under the leadership of the present principal that my child would be in jeopardy because I went to the private school. I don't mind telling you that.

Q And are you saying, then, that if it was a different principal that you would send your child to the public school?

[88] A Yes, sir, I think if it was a different principal this whole question wouldn't have come up, wouldn't be a lawsuit.

Q All right. And then you are testifying that the reason that your children attended private school is the principal, is that not what you are saying, rather than problem that you indicated earlier?

A I am saying on the assumption that he would not receive the same *objectives* that the other children do that attend there.

Q Then that is your objection, rather than the other testimony which indicated that he had an emotional problem?

A No, sir, I'm not saying that.

MR. FARESE:

May it please the Court, he is asking him a general question, not pinpointing it to —

THE COURT:

Are you objecting? I sustain the objection.

MR. FARESE:

All right, sir.

THE COURT:

Any redirect?

MISS JONES:

We have no further questions, Your Honor.

[89] THE COURT:

All right.

You may stand down.

MRS. W. P. WRIGHT,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FARESE:

Q You are Mrs. W. P. Wright?
A Yes, sir.
Q You are one of the plaintiffs in this case?
A Yes, sir.
Q Mrs. Wright, we have established previously that you taught in the Calhoun County Public School System for six years. That's correct, isn't it?
A Correct.
Q And prior to that, you taught two years in Houston?
A Yes, sir.
Q Now, where do you live, Mrs. Wright?
A Five miles north of Calhoun City.
Q And how long have you lived in Calhoun County?
A We moved there last April. Oh, in Calhoun County?
[90] Q Yes, ma'am.
A Excuse me. All my life.
Q All right.
Now, what does your husband do?
A Farmer.
Q And how many children do you have?
A Two.
Q And what are their ages?
A Ten and seven.

Q Referring to the ten-year-old child, is it a boy or girl?
A Boy.
Q Now, this ten-year-old boy, where does he go to school?
A Calhoun Academy.
Q How long has he gone to school there?
A Three years.
Q Prior to the time that Mr. Roger Hudson became principal, were you ever told to take your child out of that school?
A No, sir.
Q Were you ever told that it was detrimental to the public school for you to have your child in that school?
A No, sir.
Q All right.
[91] Now, you have another child?
A Yes, sir.
Q How old is that child?
A Seven.
Q Is that a boy or girl?
A Girl.
Q And what school does the seven-year-old child go to?
A Academy.
Q How long has she been going there?
A Second year.
Q This is the second year?
A (Moving head up and down)
Q Why did you send your child to a private school?
A Well, the smaller classroom was very appealing to me. Get much more personal attention in the class. And also, the fact that we live just a short — within walking distance of the school.

Q All right.

Now, of course, if you taught in the public school, couldn't your children ride with you?

A Yes.

Q Well, is that one of your valid reasons or do you have an explanation for that?

[92] A No, I ran into the problem of teachers' meetings after school, and my children could walk on home from school.

Q How far would they be from the public school?

A Five miles.

Q All right.

Now, did you have any other reason for sending your children to the private school?

A I was very impressed with their religious program there. It's a very good basic Bible story every morning, devotional, and I am very impressed with that.

Q What denomination are you?

A Methodist.

Q And you feel that your children deserve some religious training in the schools?

A Yes.

Q Now, Mrs. Wright, after you were advised that you would not be re-hired unless you pulled your children out of the private school and sent them to the public school, did you make any attempt to secure any employment?

A No, sir.

Q Well, why didn't you do that?

A I wanted to be reinstated in my job. I am very fond of my position after six years.

Q All right. Well, I know. But why didn't you seek

employment in some other school system away from Calhoun [93] County?

A Well, that would have meant just having to move. And, of course, there is no way I could have any other kind of employment that I know of unless we moved. I certainly didn't want that.

Q Would your husband be in a position to move?

A Well, it's impossible for him to move.

Q You would have had to leave your home in Calhoun County?

A Yes.

Q And your family and children, is that correct?

A Yes, that's correct.

Q Is that the reason you didn't seek any teaching position?

A Certainly.

Q Have you ever done any other type of work?

A In home extension with the Extension Department, for a year or so.

Q Why didn't you try to get some home extension work in Calhoun County?

A There were no jobs available.

Q Now, Mrs. Wright, during the period of time that your children attended the private school, did this in any way affect your efficiency as a public school teacher?

A If anything, it made me work harder.

[94] MR. HICKMAN:

I think this is a conclusion, if it please the Court.

THE COURT:

Well, I will allow it.

MR. FARESE:

Q Did it, ma'am?

A If anything, it made me do a better job.

Q Did you have any divided loyalties?

A None whatsoever. Because I am very devoted to my students.

Q And do you believe in the public school system?

A Very much so.

Q If they taught religion in the Calhoun Public School System, would you send your children back there?

A Yes, sir.

MR. FARESE:

I have no further questions.

THE COURT:

Have you ever had a child in the public school?

THE WITNESS:

Yes, sir.

THE COURT:

Under what circumstances?

THE WITNESS:

[95] My son, in the first grade.

THE COURT:

At that time, were the schools segregated?

THE WITNESS:

Yes, sir.

THE COURT:

All right.

You may cross examine.

CROSS EXAMINATION

BY MR. HICKMAN:

Q Mrs. Wright, how long has your ten-year-old son been in the Calhoun Academy?

A Three years.

Q Has he been in the private academy since the integration of the Calhoun Public School System?

A No, sir. It was integrated the first year, when he was in the first grade.

Q Integrated in mid-term of that year, was it not?

A No, sir. At the beginning — I mean, I don't know exactly when integration took place, but it was — the class was integrated when Mike attended the first grade.

Q All right. And he attended one year?

A Yes, sir.

Q All right.

[96] The next year, you transferred him to the academy, didn't you?

A Yes, sir.

Q And he is still at the academy?

A Yes, sir.

Q And the academy, of course, is an all-white school?

A Yes, sir.

Q Now, do your children walk to school?

A Yes, sir. Well, not — of course, when it's inclement weather they don't.

Q When the weather is pretty, they walk?

A Yes, sir.

Q Now, if they attended the schools in Calhoun City, they could ride the bus, could they not?

A I'm not sure that a bus passes there. I'm not sure. Because I think we are really about halfway between Calhoun City and Bruce. I'm not real sure. I have never inquired.

Q Now, I believe that you testified that after you left the Calhoun City schools that you didn't seek employment.

A No, sir.

Q All right.

At the academy, do they have a football program?

A Yes, sir, this year.

[97] Q Is this the first year?

A They have had a physical education program, as much as the teachers could provide, but this is our first year for a legitimate football team.

Q This is your first year that you are having such a program?

A Yes, sir.

Q And do you have an organization of mothers of the students at the academy? I mean, do you have an organization of the parents?

A Yes, we have a patrons —

Q And you meet together and discuss the private school?

A Yes, sir.

Q And ways to improve the private school?

A Yes, sir.

Q And ways to raise money for the private school?

A Yes, sir.

Q And this, of course, you have participated in?

A Yes, sir.

Q Now, have you ever helped raise money, during the time you were teaching in the public school system, for the private school?

A Yes, sir.

Q During the time that you were teaching in the [98] public schools, being paid by the State of Mississippi —

A The only capacity would be as a room mother.

Q But as a room mother you helped raise funds for the private school?

A Yes.

Q Now, you testified a little bit earlier that you had no divided loyalty. Isn't this true, that you were working for the private school as room mother and raising money?

A I worked at school from eight till three and any other activities that involved patrons club or homeroom mothers or anything like this was certainly after school, it did not involve my schoolwork at all.

Q Are you saying, then, that your schoolwork does not require any work after you leave at three o'clock?

A Certainly, yes, sir.

Q It did require it?

A Yes, sir, many times.

Q All right. So you actually were involved in the work of the public school system and in the activities of the private school system?

A Yes, sir.

Q All right. So you did have, you might say, a responsibility to both, to some degree?

A Yes, sir, certainly. I had a child there.

Q All right.

[99] So when you said a moment ago that there was no divided loyalty —

A None.

Q But there was a working relationship between both of the facilities.

MR. FARESE:

Now, may it please the Court, we object. Divided loyalty. I can work for my church and my state and still have no divided loyalty.

THE COURT:

He has her on cross-examination; overruled.

MR. HICKMAN:

Q Now, what grades did you teach in the county —

A I teach high school, special ed, vocational rehabilitation program.

Q You were in a vocational rehabilitation program in the high school in Calhoun County?

A Well, it is at the junior high, but fourteen through twenty-one years of age students.

Q All right.

Just what were your duties in that position?

A Our program is a work-student program. The students attend the class half the day and then they are placed on the job.

Q Now, did children come to you that had problems?

[100] A Certainly.

Q That was your —

A Yes, sir.

Q And so if a person had some type of a defect, they would come to you and you would try to be of assistance to them, would you not?

A Certainly.

Q And that's your specialty in the Calhoun School?

A Yes, sir.

Q And that was a service that the Calhoun Schools offered to its students —

A No, sir, this is vocational rehabilitation that offered our services. Medical expenses, therapy, anything like that came not through the schools, but through vocational rehabilitation.

Q All right. But it came through the county school system, didn't it?

A Well, my counselor is from — no.

Q All right. Where were you teaching?

A Calhoun City.

Q That's what I'm saying. You were teaching at the school.

A Yes.

Q And the service that you provided was provided through the Calhoun Public Schools.

[101] A The facilities, my teaching facilities.

Q All right. And these facilities were available at the public school?

A Yes, sir.

Q Now, are these facilities available at the academy?

A They don't have the special ed program there, no.

Q All right. So if a person had some type of a problem, needed special attention in the public school system, they could come to your department, couldn't they, Mrs. Wright?

A No, sir, not unless they are qualified or unless they have been screened and approved by the state department.

Q All right. But then they could make application, couldn't they?

A Yes, sir.

Q And then you would screen them?

A Yes, sir.

Q And if they found that this impediment or some condition existed, they would be qualified, wouldn't they, Mrs. Wright?

A Of course, that is not my responsibility, to qualify them. I don't know. But if they were qualified, yes, we would serve them.

[102] Q All right. And those are the students that you provided your service to?

A Yes.

Q Now, your seven-year-old daughter, I believe she likewise attends the academy.

A Yes.

Q Has she ever attended the public schools?

A No, sir.

Q How long have you lived in Calhoun County?

A All of my life.

Q Now, do you recall when the Calhoun Academy was established?

A I have no idea.

Q Well, approximately.

A I would say four or five years, I have no idea.

Q About '68 or '69?

A Not for a fact, because I don't know.

Q It wasn't established the year that your child was in the public school system, was it, Mrs. Wright?

A Yes, sir, I believe, yes, sir.

Q That was the first year?

A Yes, sir, surely was.

Q Did you say it was the first year?

A I don't know. I didn't say that because I'm not really sure.

[103] Q All right.

But your seven-year-old daughter you never did send to the public school system, did you?

A No, sir.

Q Now, I believe that you testified that you were able to pursue your duties without any interference because of the fact that your children were in the private school; is that right?

A That's correct.

Q Now, are you totally committed to a desegregation school system?

A No, sir.

Q You are not?

MR. FARESE:

Your Honor, we would —

MR. HICKMAN:

Now —

MR. FARESE:

Just a moment.

We would object to that question, may it please the Court.

THE COURT:

Overruled.

MR. HICKMAN:
We have no further questions.

[104] THE COURT:
Any redirect?

MR. FARESE:
Your Honor, did I understand she said no to that last question?

MR. HICKMAN:
That's right.

THE COURT:
Ask the reporter.

MR. HICKMAN:
As I understand it, she said she was not.

THE COURT:
All right.
Anything further?

MR. FARESE:
We have no further questions.

THE COURT:
You may stand down.
Who will the plaintiffs have next?

MR. FARESE:
Your Honor, I wonder if counsel would agree that in

the State of Mississippi — or the Court could take official notice of the fact that we do not have a compulsory attendance law in Mississippi.

THE COURT:
[105] All right.

MR. FARESE:
And the record would so show.

THE COURT:
All right.

MR. FARESE:
Please the Court, plaintiffs rest.

THE COURT:
All right.
What say the defendants?

MR. HICKMAN:
Your Honor, could we have a few moments? It's near the recess hour.

THE COURT:
All right. I think we will just take out, then, till one-thirty.

(RECESS)

THE COURT:
What say the defendants?

MR. RAYBORN:
Defense calls Doctor Francis Joseph Eicke.

FRANCIS JOSEPH EICKE,
being first duly sworn, was examined and testified as follows:

[106] DIRECT EXAMINATION

BY MR. RAYBORN:
Q Would you please state your full name to the Court.
A Francis Joseph Eicke. (spelling) E-I-C-K-E.
Q What is your address?
A 321 Ridgewood Manor Drive, Oxford.
Q What is your profession or occupation at the present time?
A At the present time I am an Assistant Professor of Guidance and Educational Psychology at the University of Mississippi.

MR. FARESE:
Your Honor, to save time, we will admit from what they have shown us that he is qualified in this field as an educator.

MR. RAYBORN:
Educational psychologist, Your Honor.

MR. FARESE:
Please the Court, of course, we do reserve the right to cross-examine.

THE COURT:
All right.
Do you have a resume you wish filed?

MR. RAYBORN:
[107] We would like this marked for identification, and introduced.

THE COURT:
All right.

THE CLERK:
Defendants' Exhibit Number Two.

MR. RAYBORN:
Q Doctor Eicke, based upon your education, research, training, background and experience as included in this resume which has been made a part of the record, do you have an opinion as to whether a policy stated as follows: prior to the employment of a new teacher, or the re-employment of an existing teacher, the children of any such teacher, if living in Calhoun County, did not attend the public schools of said county, or if living outside said county did not attend public schools, said teacher would not be employed or re-employed, do you have an opinion as to whether this policy is significantly related to the job performance of a classroom teacher?
A I do.
Q What is that opinion?
A I think it would be reasonably and significantly related to job performance.

Q Doctor Eicke, what is the basis of that opinion?

A The basis of it is two major factors and one [108] contributing factor. The first kind of thing that I would comment upon is that, as the policy states and as I would hold, a teacher sending children to a private school would be evidencing a rejection of the public school system and this would set up certain kinds of variables operating.

The second thing is that I think the students would perceive this rejection and as a result would react to the teacher in a different kind of way than if they perceived the teacher as totally committed to the educational system.

Do you want me to go on?

Q Doctor Eicke, what is referred to by educational psychologists as interpersonal relationships?

A Okay. The kind of thing that operates in a classroom is that a major variable in learning is how a teacher relates to a student. There is ample indication from both research, my own and others, and just observation on my part that a teacher who is perceived by students as rejecting the public school system will have a difficult time, for example, reinforcing the learning that would go on in the classroom. It would be a perception on the part of students of a difference from the students, and I think this would be particularly true with the black students.

Q What would be the relationship of this rejection and perception to academic achievement?

A The major thing is that a teacher is the major [109] — or a major reinforcer of learning. And so that if there is a discrepancy in the way that a student — or let's say if there is a negative perception on the part of

the student of the teacher, this detracts from the teacher's ability to reinforce learning.

Q Now, by reinforcement, what are you speaking of in terms of this reinforcement?

A It's an operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance, has the potential for increasing or having a positive effect on learning.

Q Is this what —

A That's basically what reinforcement is.

Q Is this what educational psychologists would refer to as positive or negative social reinforcement?

A Right.

Q And what would be the effect of a negative social reinforcement?

A The negative social reinforcement is shown in situations where the possibility exists for a teacher not having the potential or the possibility as a functional teacher to reinforce what goes on in an appropriate way in the classroom.

Q Doctor Eicke, would a student perceive a teacher who sent their own children to a private school — a public [110] school student, would this be perceived as a negative social reinforcement?

A I think it would.

Q Doctor Eicke, what do psychologists mean when they refer to teacher expectations?

A Teacher expectation is an area that has been studied in educational psychology dealing with a phenomenon in which what is expected of students is what they tend to do. And my contention would be that if a teacher expected less from students that the stu-

dents would tend to perform at a lower level; and conversely, if the teacher expected more, the students would tend to perform better. This need not be a conscious kind of thing. In fact, it usually isn't. And I would think that a teacher that rejects the public school system as acceptable for their own children would set lower expectations that they would then come in contact with.

MR. FARESE:

Now, please the Court, we will object to anything that he thinks. I mean, if he is basing it on —

THE COURT:

Well —

THE WITNESS:

I can rephrase that as my opinion.

THE COURT:

You may rephrase it. But he is qualified to [111] give an opinion as an expert. Do you wish to rephrase it?

THE WITNESS:

I could state that is not only my opinion but based on an accumulation of research.

MR. RAYBORN:

Q By having these lower expectations of the students, Doctor Eicke, would that detrimentally affect the learning motivation and progress of the students?

MR. FARESE:

Your Honor, we object.

THE COURT:

Sustained. Rephrase your question.

MR. RAYBORN:

Q Doctor Eicke, what, if anything, would be the effect of a low teacher expectation on a student?

A It's pretty clear that it's lower achievement on the part of students.

Q Doctor Eicke, are there any student variables involved in this area?

A Yeah, I think there are some peculiar to perhaps Mississippi. Such a thing as the Coleman Report, an extensive report of achievement, as well as a number of other things throughout the nation, indicated that the students in the South, of both races, are achieving a lot lower levels than students in other sections. I think we are starting off at an inferior [112] kind of position and that what this translates to is that we have students who are characterized by lowered academic motivation, a lack of early experiences when they come to school, and so I would professionally think that anything that school systems do to positively affect what effect they have on children is a reasonable kind of thing.

Q All right.

Doctor Eicke, will the student perception of the teacher modify the responses of the student in the learning process?

A That is the function of perceptions. It's a situation in which if I perceive a person negatively how I react to that person will tend to be changed negatively.

Q And it is your testimony here today that —

(Plaintiffs' counsel standing)

MR. RAYBORN:

I will rephrase it, that's all right.

Q Doctor Eicke, what, if anything, would the effect of this negative perception be with respect to a teacher who send their child to a private school teaching in a public school which is the effect on the children in the public school?

A My opinion is that —

THE COURT:

Well, let's modify it to a private school that [113] is all white.

THE WITNESS:

The :e is no doubt in my mind that students are well aware of situations that exist in Mississippi, and that they are well aware of individuals within the community who support the kind of academies that have come about in recent years.

MR. RAYBORN:

Q Doctor Eicke, then is it your opinion, then, based upon the reasons that you have been setting forth here for the past few minutes —

(Plaintiffs' counsel standing)

THE COURT:

Do not lead the witness. I think counsel is about to object.

MR. RAYBORN:

All right.

Q Doctor Eicke, based upon the reasons that you have just set forth, do you have an opinion as to whether or not the above-stated policy is imperative that the best interests of the children attending public schools in rural southern counties, such as Calhoun County, Mississippi, involving the so-called integration academies are concerned if the best interest of the children are to be served?

A I do think it's reasonable.

[114] THE COURT:

You may cross examine.

CROSS EXAMINATION

BY MR. FARESE:

Q Doctor Eicke, where were you born?

A In New Orleans, Louisiana.

Q And where did you go to school?

A My initial schooling was in a Catholic school, through the ninth grade.

Q Excuse me, sir, a Catholic school? Is that a parochial and private school?

A Yes, sir.

Q All right. Go ahead.

A And beginning with the tenth grade, I transferred to a public school, where I completed high school. Would you like to go on?

Q Oh, yes, sir, please do, sir.

A Okay. I then attended Dartmouth College in Hanover, New Hampshire.

Q Dartmouth College? Is that a private school?

A Yes, it is.

Q Not a public school, is it?

A No.

Q Did you learn anything wrong in these private [115] schools?

A I think I learned an awful lot wrong in the Catholic school.

Q Oh, did you? Who taught you in the Catholic schools?

A Brothers and sisters.

Q Are you now a Catholic?

A No.

Q Is that why you say that you were taught wrong?

A No.

Q Did Jesuits teach you?

A No.

Q What grades —

A The first eight grades were in a — of course, an elementary school, and the ninth grade was in a high school.

Q Who taught you in high school?

A Brothers.

Q All right. When you were in the ninth grade in the Catholic parochial school, they taught you Latin, didn't they?

A Right.

Q Yes, sir. And they taught you every form of mathematics, didn't they?

A No; they taught me algebra.

Q All right. Algebra for that period. And are [116] you going to tell this Court that you did not receive a good education in a parochial school?

A If I might define —

Q Please, sir, excuse me. If you will answer my question, you can explain it any way you want.

A Restate the question.

Q Did you receive a good education in the parochial schools?

A By my definition of education, no.

Q Why not?

A The academic training that was involved in the Catholic school I would accept as —

Q Above normal?

A — high level. The kind of emotional things or social learning that went on, for me, I feel personally like I had a period where I had to adjust to it because the school was not conducive, in my way of thinking, to social development.

Q All right. The schools taught you religion, didn't they?

A Yes, sir.

Q Taught you catechism?

A Right.

Q And that was a required subject in all Catholic schools, right?

A Right.

[117] Q And you were to obey the law, weren't you?

A I think my mother and father taught me that.

Q Oh.

A I didn't learn that from taking catechism.

Q Oh. Do you abide by the Ten Commandments?

MR. HICKMAN:
We object.

MR. FARESE:
Your Honor, this man is an expert.

THE COURT:
He qualified him as a psychologist, not by the laws of God.

MR. FARESE:
All right.

Q Let's talk about your psychology. Do you think that it is wrong for a person to go to a parochial or to a church-related school?

A (No oral response).

Q You are hesitating.

A Personally?

Q Yes, sir. I want to know. You are testifying as an expert.

A Not any person. I think if a teacher were teaching the public schools that that involves another [118] kind of commitment.

Q All right.

Let's assume that teachers in the State of Mississippi and in the universities, high schools and grammar schools teach in the public schools. Do you tell this Court that in your opinion that they should send their children to a public school?

A Yes.

Q Without qualification?

A My qualification would be that I would think in terms of the grade levels.

Q Well, do you think that there is a place in America for both public and private schools and parochial schools and church-related schools?

A Yes.

Q Then, if there is a place in America, what's wrong with parents sending their children to those schools?

A Inherently, nothing. Except for the fact that it raises certain conflict of interest ideas.

Q All right.

Now, let's talk a little bit about conflicts of interest. In other words, if I understand your testimony, if a teacher is securing money from a state-supported school, that teacher owes the state the obligation of sending his or her children to the public schools. Is that your —

[119] A Yeah, if they are committed to public education, I think you should.

Q All right. So, then, every teacher who is being paid by the State of Mississippi owes an obligation to send his or her child to a public school. Is that what you are telling us?

A That would be my personal opinion, yes.

Q And basing your personal opinion on that, you base it on the same reasoning on a local level, right?

A Right.

Q All right. Let's go to the national level. Do you think that every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her child to a public school?

MR. HICKMAN:

Your Honor, we object to this. This is irrelevant as far as the Federal Government is concerned.

MR. FARESE:

Your Honor, I want to see on what he predicates his opinion, if he has it, on the state level, on the national level.

THE COURT:

All right.

You may answer.

[120] THE WITNESS:

My thinking on that is that as long as the public schools can meet the needs of the kids that are involved —

MR. FARESE:

Q That they should do that?

A Yes.

Q And if they don't do it, they shouldn't receive pay from either the state or the Federal Government?

A You are talking in terms of any person?

Q Teachers or teacher-related or school-related activities. I am going to confine it to that.

A Yes, I think a person who teaches in the public schools should be committed to the public schools.

Q Now, have you made a study of the small towns in Mississippi?

A Just in terms of my associations with various programs.

Q Well I am asking you the question, Doctor, if you have made a study about the school problem and problems that people in Mississippi are undergoing.

A I have made studies in Alabama which are comparable.

Q Doctor, you understand my question. I asked about Mississippi. Yes or no? And then explain it any way you want.

[121] Q If you are talking about a formal study, no.

Q All right, sir.

Now, in other words, I understand your testimony to be that there is a relationship between the teacher and the student and that if the student felt that the teacher was sending his or her child to another school that this would hurt the other student. You said that, didn't you?

A That's right.

Q All right.

Now, do you also say that if a teacher does something which you consider immoral that that teacher should not be hired in that school system because the children would have known it and she would have lost her effectiveness?

A To — maybe to generalize what you are getting to, there is dynamic kind of interaction between a teacher and a pupil. Anything that detracts from a positive perception of that teacher may affect learning.

Q All right.

Let's assume that there is an unwed mother who has —

THE COURT:

Mr. Farese, that case has been tried, it is on appeal.

MR. FARESE:

Well, Your Honor, I want to see what his opinion [122] —

THE COURT:

I rule it out. Now let's get back to the question of public school teachers with children in private schools.

MR. FARESE:

All right.

Q Now, what about children with afflictions and special problems? Do you think exceptions should be made to the general rule?

A Yes.

Q In other words, if a child were a slow learner and the parent felt that that child could get a better education in another school, you would agree, of course, that the child should go there?

A Assuming that facilities that were available there were better or which didn't exist in the public schools.

Q All right.

Now, assuming that a child is emotionally disturbed or upset in large schools and large classrooms and maybe tense airs or atmosphere and the parent felt that in a smaller school class that child would receive better training, you would think that would be reasonable, wouldn't you?

A If they did it on professional advice.

Q Yes, sir.

[123] A And the conditions were —

Q That's right. A doctor or psychologist recommended that, there would be nothing wrong in that.

A Right.

Q In other words, you do tell the Court that this should not be a blanket, irrevocable policy, that each case should be considered on its own matters?

A That's right.

Q You would agree with that?

A It's well known that there are schools available for emotionally disturbed kids that are not available in many public locations, including Mississippi.

Q My question, Doctor, is this. You will agree that there should not be a blanket policy but that each case should be taken on its individual merits and decided on those merits, right?

A Okay.

Q You are saying yes, sir?

A Yes, sir.

Q All right, sir.

Now, did you go into the situation in Calhoun County, this particular situation?

A No.

Q Did you talk to any of the people to determine whether or not the fact that these teachers sent their [124] children to a private school would disrupt the other children? Did you do that?

A No.

Q So you don't know anything about the Calhoun County situation, do you?

A That's right. Well, you are saying I don't know anything. I have general impressions of it.

Q I am talking about your own study, knowledge of the situation there, talking to people and going into the situation. You don't know, do you?

A (Moving head side to side)
Q You are shaking your head no?
A No.
Q All right.
Now, you are talking about student variables peculiar to Mississippi. How does Mississippi and its children differ from Washington, D.C., and its children?
A The nationwide studies that have been done in a number of — at a number of times have shown that, compared to national averages, the performance of kids in Mississippi schools tends to be lower.
Q When you say "kids," do you mean children?
A That's right, students.
Q Okay.
A Through the twelve grades.
[125] Q You are not attempting to tell this Court that the children in Mississippi are not as intellectually capable of achievement as the children in other states, are you?
A As individuals?
Q I'm talking about the children —
A No, I'm not saying that.
Q Please, sir?
A I am not saying that they are less intellectually capable.
Q All right. And you are not saying that they have a lower achievement capacity, are you?
A No.
Q Why did you say that on direct examination?
A I said they have been shown to be achieving less. I didn't say they had less capacity.

Q Now, what is wrong with exposing the children of Mississippi to the environment of a private school?
A Nothing, really.
Q All right.
What is wrong with private schools?
A In Mississippi?
Q I am talking about private schools in Mississippi or anywhere else.
A In my personal opinion, private schools do many things that I personally don't agree with. Such as segregating [126] sexes in a number of schools.
Q When you went to a parochial school, they segregated sexes, didn't they?
A That's right.
Q And you didn't like that, Doctor?
A I didn't think — as I look back on the experience now, particularly —
Q But you learned more with less distractions, didn't you?
A I think I learned as much in the next three years as I learned in the Catholic high school.
Q You mean the girls didn't distract you at all?
A I don't think.

MR. FARESE:
I have no further questions of this witness.

THE COURT:
Any redirect?
You may stand down, sir.
Call your next witness.

MR. RAYBORN:
Grady E. Harlan.

GRADY E. HARLAN,
being first duly sworn, was examined and testified as follows:

[127] DIRECT EXAMINATION

BY MR. RAYBORN:
Q Would you please state your full name.
A Grady E. Harlan.
Q What is your present address?
A Box 685, University, Mississippi.
Q What is your present occupation or profession?
A I am Professor and Chairman of the Department of Guidance and Educational Psychology at the University of Mississippi.

MR. RAYBORN:
Mr. Farese, do you stipulate —

MR. FARESE:
I will stipulate to whatever he has got on that paper.

THE COURT:
Let the resume be received.

THE CLERK:
Defendant's Exhibit Number Three.

THE COURT:
What has been your experience in child educational psychology?

THE WITNESS:
I have been an elementary teacher and have taught in junior high school, high school, college and [128] university teaching. I have been the Director of Guidance in the laboratory school at the University of Iowa and have worked with students in college counseling centers.

THE COURT:
All right.

THE WITNESS:
Veterans in veterans hospitals.

THE COURT:
All right.
Proceed.

MR. RAYBORN:
Q Doctor Harlan, based upon your education, research, background, training and experience as set forth in the exhibit which has been made a part of the record, do you have an opinion as to whether a policy stated as follows: prior to the employment of a new teacher of the re-employment of an existing teacher, if the children of any such teacher is living in Calhoun City, did not attend the public schools of said county, or if the children of any such teacher, if living outside

said county, did not attend public schools, said teacher would not be employed or re-employed, do you have any opinion as to whether this policy is significantly related to the job performance of a teacher?

A Yes, I do.

Q What is that opinion?

[129] A I feel that the policy is reasonable.

MISS JONES:

I'm sorry, Your Honor, I didn't hear the response. Would the witness please repeat it?

THE WITNESS:

Yes. I said I felt the policy was reasonable.

MR. RAYBORN:

Q You are saying that it was reasonably related to job performance?

A Yes, it is.

Q Doctor Harlan, what is the basis of that opinion?

A Well, the relationship between students and teachers in classrooms, it has been my experience in the research studies that I have completed, is important to the child's achievement. Also based on speeches and contacts I have had with groups of students.

Q Now, you are talking about students in Mississippi?

A Right, students in Mississippi. I spoke to a high school group of girls, junior high-age girls, approximately two months ago and we were talking about stu-

dent behavior, expectation of behavior between parent and child and the school setting, and I left about twenty minutes available for questioning. The first questions asked me —

MR. FARESE:

[130] Now, may it please the Court, we are going to object to anything that anybody else said unless they are here to testify and subject themselves to cross-examination.

THE COURT:

It sounds like hearsay.

MR. RAYBORN:

Sir?

THE COURT:

It sounds like hearsay.

MR. RAYBORN:

Yes, sir.

MR. FARESE:

Yes, sir.

THE COURT:

This witness can express his expert opinion and not go into what someone else told him.

THE WITNESS:

Okay. Just setting the stage for the fact that stu-

dents do ask, you know, "Do you have children? What do they do?"

MR. FARESE:

Your Honor, we would object to what somebody else asked him in some other place. That is purely hearsay. He can say he bases his testimony on his research, but if he is going into particulars, let the people come here and [131] testify.

MR. RAYBORN:

Your Honor, his research would include the conversations and interviews with various students around.

THE COURT:

Well, can you express an opinion without saying what somebody asked you? Do you understand?

THE WITNESS:

Well, my opinion is that students want to know about my background and what I do and whether or not I have children and what they do.

MISS JONES:

May it please the Court, I am going to object to that. He is giving us his personal experiences. I can testify, and everybody else in this room, to that. If he is an expert, the question is, upon what does he base this? If he is saying it is his personal experience, then I say he is not testifying as an expert.

MR. RAYBORN:

Your Honor, he said he is basing it upon his research, and training, and background and experience in the entire field of educational psychology.

THE COURT:

Are there psychological principles involved you could refer to?

[132] THE WITNESS:

(No oral response)

THE COURT:

Based on your studies.

THE WITNESS:

Yes, it's based on the area of how students perceive you as a human being and as a person and how you are relating to them and what kind of commitment you are making to yourself and to the agency with which you are coming in contact with, whether it be a classroom agency, or a group of students, or whatever setting you care to work in.

MR. RAYBORN:

Q Doctor Harlan, would this be in the field of teacher expectations, then?

A Yes, it would.

Q Could you tell the Court some bases in this area for your opinion?

A Well, approximately two years ago I completed a study in Olive Branch, Mississippi, with a group of third-grade age children who were poor achievers,

slow learners in elementary school in Olive Branch, and the essential elements included in the study was a system of positive reinforcement where we were attempting to make the student a winner in the classroom. Every problem that he attempted, we reinforced him positively. We measured these students with achievement [133] tests and at the beginning of the study pre-measured, post-measured the students at the end of the study and we found that by using a system of positive reinforcement that we could, and did, intervene in their achievement.

MISS JONES:

Your Honor, I would like to have a little explanation here about what the heck he is talking about. If we are talking about Pavlov's dog and the response to stimulus —

THE COURT:

You will have a chance to cross examine, Miss Jones.

MISS JONES:

I don't think the response was responsive.

THE COURT:

If you are objecting, you are overruled.

Put your next question.

MR. RAYBORN:

Q Now, in the area of social reinforcement, Doctor Harlan, what, if anything, does this social reinforce-

ment which you just related to us have to do with teacher attitudes and their effect on the learning of the students?

A Well, in my opinion, it has a great deal of effect because these students were attending regular classes at the same time the study was going on, the one I was just [134] describing, and they were not getting the same kind of commitment and agreement that we were providing in the study we were doing.

Q Doctor Harlan, would a student in a public school who has a teacher that sends their own child to a private school perceive that teacher in terms of negative social reinforcement?

MR. FARESE:

Your Honor, we object to the form of the question.

THE COURT:

Sustained. It is leading.

MR. RAYBORN:

Q Doctor Harlan, what, if anything, would a student who is in a public school and whose teacher sends their own child to private school, what would that student perceive, if anything, that would affect his learning?

A Well, in my opinion, that would set up a system where other students would perceive or could perceive the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend.

Q What, if anything, would be the effect on the learning of the children in the public school class?

MR. FARESE:
[135] Your Honor, we object to the form of the question.

THE COURT:
Well, I will allow that.
You may answer.

THE WITNESS:
Allow the question? Please —

MR. RAYBORN:
Q What, if anything, would be the effect of that on the learning process of the student in that class?

THE COURT:
What effect would it have?

THE 'VITNESS:
Well, if the student is perceiving the teacher as negative and that it is not a viable place for your own children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, probably would not achieve as well.

MR. RAYBORN:
Q Would this be a positive effect or detrimental effect?
A Well, I would say it would be detrimental. I wouldn't use "detrimental," I would probably use something like negative or just a lack of positive reinforcement.

Q Then, Doctor Harlan, do you have an opinion, based [136] upon your qualifications as set forth, experience, as to whether this policy that we are talking about in terms now is imperative that the best interest of the children attending the Calhoun County Schools be served?
A Yes, I do.
Q What is that opinion?
A Well, I think the policy is reasonable to encourage the community and school to establish one unitary school system.
Q And do you think that this policy is imperative for the best interests of the children in the public school?

MR. FARESE:
Object to the form of the question as leading.

THE COURT:
Sustained.
Do not lead the witness.

MR. RAYBORN:
Q Do you have an opinion as to whether this policy is imperative to the best interests of the children attending public schools in Calhoun County?
A Yes.
Q What is that opinion?
A Well, that opinion would be that if the entire teaching staff is committed to furthering the public education in that county, then the students have a better chance of [137] being successful, achieving.

Q Doctor Harlan, are you familiar with any reports or studies in this area of teacher expectations, in particular, a report written by a Robert Rosenthal?

A Yes, sir.

Q Doctor Harlan, do you have a copy of that with you?

A I —

MR. RAYBORN:

Could you mark this for identification, please, and hand it to him.

THE CLERK:

Defendant's Exhibit Number Four.

MR. RAYBORN:

Q Doctor Harlan, I ask you if you can identify that.

A Yes, I can.

Q Would you do so, please.

A Right. It's the "Chameleon Effect Lives" and this is an article by Robert Rosenthal and it comes out of the September, 1973, "Psychology Today" on page 56.

Q Now, this chameleon effect that you are talking about that this article speaks of, could you give a brief description as to how this relates to the teacher expectations and the effect that it has on a school child.

[138] A Yes. The general effect is that the teacher expectation of the student is related to the student performance. If you expect a student to achieve, if you expect a student to be able to learn, then generally the student learns. If your expectation is the student can-

not learn, the student is dumb, however you would want to describe the student, typically the student would meet that expectation, he would achieve less.

Q Doctor Harlan, do you have an opinion as to what the expectation of a teacher would be who would send their child to a private school while teaching in a public school with respect to the expectation of children in the public school?

A I wouldn't have an opinion for any particular teacher. I would have to talk to the specific teacher on that. But the general idea would be — my opinion would be that if you felt that public school was not good enough for your child, you would just have a negative feeling about the public school. You wouldn't think it was good enough for your child and, therefore, you have to send him to a private school. Seems like it would be putting the public school down.

Q In other words, low expectations?

A Low expectation.

Q And this is the general area in which this [139] particular study deals?

A Yes, it is.

MR. RAYBORN:

Your Honor, we would like to have that attached as part of the record.

MISS JONES:

Your Honor, we are going to object to that as attempting to introduce a third expert's opinion about something and the expert isn't here to cross examine.

THE COURT:

Objection sustained.

You may cross examine.

CROSS EXAMINATION

BY MR. FARESE:

Q Doctor, where were you born?

A I was born in New Mexico.

Q Where did you go to school?

A I went to Stetson Elementary School —

Q Excuse me, sir. Let me rephrase my question, we will get through. Did you go to public schools all your life?

A Yes, sir.

Q Where did you go to college?

A I went to Western New Mexico University in [140] Silver City, New Mexico, for a Bachelor's Degree, Master's Degree; I attended the University of Iowa for a Ph.D. Degree.

Q All right.

Now, Doctor, you have testified at great length about your opinion as an expert, that in your opinion the children's achievement level would be adversely affected if the teacher taught in one school and the child went to the other. You said that, didn't you?

A Well, I would have to read the testimony back to be exactly sure what I said.

Q Did you, in substance, say that?

A Yes.

Q All right.

Now, did you make an examination in this particular case to see whether that was the case or not?

A You mean of the three teachers involved?

Q Yes, sir. Or of any school where the teachers taught in the public school and sent their children to private school. Did you make any such test, examination, or experiment?

A Yes, I have been the director of a project for the last three years where we have been attempting to increase the interaction between the school and the community and the student and the teacher in public schools in Mississippi.

Q Well, Doctor, would you please answer my question? Did you actually make an examination yourself, go [141] into a community and talk to the teachers and the students to see what the reaction would be, if any?

A Yes, as a matter of fact, I did.

Q Where did you go?

A Well, in Bruce, Mississippi, I have a good deal of knowledge about some of the schools in Bruce.

Q All right. Did you talk to any —

A That's in Calhoun County, incidentally.

Q Did you talk to any of the students?

A Yes.

Q Did you ask them whether or not they felt anything adverse to a teacher teaching in that system and sending the children to a private system? And if so, give me their names.

A Well, I can't give you anyone's name. I have talked to a number of students in that system.

Q Give me one name that you asked that child whether or not he or she was affected if a teacher taught in the public school system —

A No, no one. I didn't ask that particular question.
Q So you didn't ask that question?
A No, not that question.
Q Now, on what do you base your opinion as an expert that this is a valid, good, and sound administrative [142] policy?
A You are asking my basis for the policy, whether it is sound?
Q Yes, sir.
A I believe that the system is under court order at this point to develop a unitary school system, and they need every bit of support that they can possibly receive from teachers, students, and parents in order to establish a viable school system, which they are attempting to do.
Q All right.
A And I think this policy is related to their carrying out that particular court order and to establish a single unitary school system.
Q All right.
Then, Doctor, I would presume, basing that on a local level, that your opinion would be the same if I asked if a teacher were employed at the University of Mississippi, Mississippi State, Mississippi Southern, or any state-owned school, that that teacher teaching in a public school owes the state and the school system the duty and obligation of sending their child to a public school.
A Yes —
Q You are hesitating.
A Yes, that would be my opinion, that you should support public education if you are a public school employee.

[143] Q All right. So there is no room, in your opinion as an expert, for any private school, church-related or otherwise, like Blue Mountain College — you are familiar with Blue Mountain?
A No, I am not.
Q Blue Mountain is a formerly all-girls school, it's a Baptist school in Blue Mountain, Mississippi.
A Thank you. I am glad to know that.
Q Yes, sir.
Now, if a teacher at the University of Mississippi saw fit to send his or her child to Blue Mountain College, you think that that teacher is doing the public school system a disservice and is affecting the achievements of the public school children?
A I thought you asked me about the public school, which I would identify as the elementary and secondary, not higher education.
Q No, sir. I asked you about the University of Mississippi, Mississippi State, and Mississippi Southern. You know that they are universities?
A Right, I do.
Q Well, my question is the same.
A The question is not relevant because each university has defined different and unique purposes and there are different programs at each university. It's not a general [144] institution. We do not have all of the same programs at the University of Mississippi that you would have at Mississippi State, or at the University of Southern Mississippi, or at the college you informed me about, Blue Mountain College.
Q To expedite and to facilitate, you are Doctor Harlan?
A Yes, sir.

Q Doctor Harlan, assuming that all of the training that you could get at Blue Mountain College you could get at Ole Miss, or Mississippi State, or Delta State, or Mississippi Southern. Do you feel that if you were teaching at one of these universities you would owe the state the obligation of sending your child to a public school rather than Blue Mountain College?

A I would feel that for me and my child.

Q All right. And also on a national level, if you occupied a position with the National Education Program, Title I, II, III, IV, if you were getting Federal money, you believe that a person working for the Federal Government in the school system should send their child or children to a public school if the public school gives the same type of education as a private school?

A Are you asking me to speculate or —

Q No. I am asking you your opinion as an expert, Doctor. That's what you came here to testify as.

[145] A I don't know. I don't work for the Federal Government and wouldn't know.

Q Well, you put it on the state level, you put it on a local county level. Why wouldn't you put it on a national level?

A Well, if I were an expert at working at the national level, I would be willing to respond to you.

Q You came here to qualify as an expert educator, didn't you?

MR. HICKMAN:

Your Honor, he has qualified on the state level. He said he was not able to testify, and he has asked him about twice. He has answered the question.

THE COURT:

I think it has been covered.

MR. FARESE:

All right.

Q Now, Doctor, in other words, in your opinion, a blanket policy such as that adopted by the Calhoun County Board is a good, sound education, Constitutional policy?

A I do not —

MR. HICKMAN:

That is calling for a legal conclusion, please the Court.

THE COURT:

[146] Well, leave out "Constitutional."

MR. FARESE:

All right.

Q What about the others?

A Will you restate it, please?

Q In other words, the policy adopted by the Calhoun County School Board is, in your opinion, a sound educational policy; right?

A Uh-huh.

Q Please, sir?

A Yes.

Q Do you believe that a teacher employed in Calhoun County should be deprived of the right to send his or her child to a parochial school?

A If the policy stated in that county is as it is stated, then I think you should make a decision about whether or not you want to work there or not.

Q All right. So that if the policy was irrevocable and it said anyone that teaches there has to send his child, regardless, to the public schools of Calhoun County, you think that that is a sound educational policy?

MR. HICKMAN:

Now, Your Honor, we object. That is not the question in issue. That is not the question. The policy has been stated.

[147] MR. FARESE:

May it please the Court, the witness Roger Hudson testified that that policy was unyielding, unbending, and that it applied in every situation. My question is directed to this expert.

MR. HICKMAN:

He didn't state the policy correctly, Mr. Farese didn't.

MR. FARESE:

I stated it —

THE COURT:

Well, restate the policy.

MR. FARESE:

Q Doctor, is a policy requiring a teacher who

teaches in the Calhoun County System to send their children to a public school or otherwise not be hired or employed, is that a sound educational policy?

A I think at this point in time it is. I would.

Q All right.

Doctor, let me give you an assumption. Assuming that a Ph.D., a very intelligent, intellectual man that believes in integration, believes in the rights of everyone, comes and applies in Calhoun County and he can be a great benefit to the school system because of his expertness, his knowledge and so forth, yet he has a child that he has sent to a [148] church private school. Do you think that the policy ought to be that that man should be denied the right of employment?

MR. HICKMAN:

Your Honor, we object to that line of questioning. It's immaterial. He has stated his opinion as to this policy, what he has thought. And he is just going over the same questions, it's repetitious.

MR. FARESE:

Judge, he is qualified as an expert.

THE COURT:

Well, I will overrule the objection.

You may answer. Do you understand the question?

MR. FARESE:

He understands it.

THE WITNESS:

No, I think you had better tell me again. You set up a hypothetical.

MR. FARESE:

All right. Let's go over it again, Doctor.

Q Assuming that a very intelligent man who is liberal in every respect — we are not talking about integration or segregation, we are talking about teacher qualifications, expertise and so forth — comes to Calhoun County and he applies for a position and that because of his expertise in the field he can be of great benefit to the educational [149] system, yet on the other hand he has a daughter or a son that he has sent to a private school. Do you contend that this policy should prevail against him?

A If the students in the school system did not accept such a person, it wouldn't make any difference about his qualifications.

Q All right.

A If the student perception of the individual were negative, the qualification would be irrelevant.

Q Fine, Doctor.

Now, did you go to Calhoun County and perceive what the perception of the students in Calhoun County was relevant to this problem?

A I have given you my opinion about how students relate to teachers, I have attempted to present another expert's opinion about that, so I will stand on that.

Q Doctor, my question was simply — if you don't mind, answer yes or no, and then you can explain it all day long. Did you go to Calhoun City and talk to the

students to see what effect that policy would have on the children?

A No. I answered that for you while ago.

Q All right, sir.

Now, you are talking about social reinforcement, teacher attitudes and all of that. You have never personally attacked this particular problem, have you? [150] A What?

Q About a teacher teaching in one school and the children going to another.

A (No oral response)

Q You are hesitating, Doctor.

A Well, I have had experience over the last fifteen years working with teacher groups. I am trying to think about the most relevant kind I could relate to you. I guess the closest experience I have had to this has been with teachers starting to work together whenever they started to form a unitary system. And in that process, it is very sensitive, the ones that I know that are still working in that matter, it's still very sensitive to them.

Q Doctor, do you believe that in the United States of America there is room for private and parochial schools?

A Why, of course.

Q Wouldn't you agree with me as an expert that sometimes one school would complement another?

A What do you mean one school complement another?

Q That one type of school would give a certain type of training that another school wouldn't.

A Well, of course.

Q I am just asking you as an expert, you would agree with that, wouldn't you?

A Of course, yes.

[151] Q And you would agree that teaching religion in the schools, there is nothing wrong with that if a student wants to do it, is there?

A Well, if you as a parent want your child to receive that training.

Q Nothing wrong with that from your viewpoint, is there?

A Since I work in public school, I wouldn't be able to respond to that.

Q Do you believe that religion should be taught in schools?

A I believe that the Supreme Court has ruled on that in a number of times. As a matter of fact, in my opinion, as late as July.

Q I'm not asking you what the Supreme Court did.

MR. HICKMAN:

Your Honor, we object. That has been decided by the courts. His personal opinion is not applicable in this case. He is giving his expert opinion.

MR. FARESE:

Your Honor, this man qualifies as an expert, I have a right to go into his background and see how he feels about these other things related to education.

THE COURT:

All right. Objection overruled.

[152] MR. FARESE:

Q Now, Doctor, answer my question. Do you believe that it is wrong to teach religion in school?

A In public schools, I do.

Q You do?

A Right.

Q Even though the child might have a choice to attend a religious study or not?

A I believe I would be in support of the Supreme Court's decision.

MR. FARESE:

I have no further questions of this witness.

THE COURT:

Any redirect?

MR. HICKMAN:

No, sir.

THE COURT:

You may stand down, sir.

JOHN GROVER BURT,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HICKMAN:

Q Would you state your name.

[153] A John Grover Burt.

Q Your address?

A Route 1, Vardaman, Mississippi.

Q The position you hold?

A Superintendent of Calhoun County School.

Q When were you elected to this position?

A In 1971.

Q Mr. Burt, give us something about your educational background.

A I graduated from Derma High School in Calhoun County, went to East Mississippi Junior College for two years, transferred to the University of Mississippi and graduated there, then went back there in the summer and completed a Master's Degree program.

Q What teaching experience, if any, have you had?

A I taught in social studies and coached basketball at Vardaman High School for four years, I taught driver education in all three of the schools in Calhoun County for one year, I was assistant high school principal and basketball coach at Bruce High School for two years, I was head football coach and guidance counselor at Vardaman High School for one year.

Q And I believe you took office as superintendent of education January of '72.

A Correct.

[154] Q And in your capacity as the superintendent of education, what are your duties?

A The running of Calhoun County schools.

Q And is this school presently operating under an order of this Court?

A It is.

Q Now, Mr. Burt, I direct your attention to the policy which you have heard discussed here this

morning and this afternoon. You are familiar, of course, with this policy.

A I am.

Q I want you to just tell the Court in your own words — did you recommend this policy?

A I did.

Q I want you to tell the Court in your own words your reasons for recommending this policy.

A I felt that in order to comply with the court order and to carry out the job of running the best schools that was possible for us to run in Calhoun County that we needed total cooperation and dedication from all people concerned with the public schools.

Q Did you make any observation of your teachers prior to your adoption of this policy?

A I did.

Q Did you come to a recent opinion as to whether [155] a teacher having a student in a private school would affect the performance over efficiency of the teacher?

A I did.

Q What was that opinion?

A I personally feel like it does affect the teacher in carrying on the performance that should be expected — that we are expecting of all teachers and the efficiencies in their job.

Q Now, Mr. Burt, what special services do you have in your school?

A We have special trained people to work in certain areas, such as with — we have speech therapists, we have guidance counselors —

Q Now, you have a speech therapist?

A Right.

Q All right.

Now, what area does a speech therapist cover?

A She works with any child who has a problem in this area.

Q Is that throughout the Calhoun County School System?

A At this time, we have a speech therapist at Calhoun City Schools, we have a speech therapist at Bruce Schools, but we do not have one at Vardaman due to the fact there's not enough work load there for one.

[156] Q But you do have one at the Calhoun County School System?

A Right. Calhoun City.

Q And you did have one last year?

A We did.

MR. FARESE:

May it please the Court, we are going to object to this line of questioning for this reason: The sole issue in this case is whether or not that policy adopted by the Calhoun County School Board was reasonable. This area about the qualification of the public schools in Calhoun County is not in controversy here and this is not pitting the public schools against the private schools but rather, "Is this a sound policy on an educational basis?"

MR. HICKMAN:

May I respond?

MR. FARESE:

We object to this line of questioning.

MR. HICKMAN:

Your Honor, Mrs. Adams testified — one of the plaintiffs in this case — that the reason that she placed her child in the private school system was because of a speech impediment. And I think that it is only proper that these defendants show that they have these services available and that they have been available for a number of years.

[157] THE COURT:

All right. It is proper defensive evidence on the credibility issue. Objection overruled.

MR. HICKMAN:

Q You had a therapist last year, a speech therapist?

A Yes.

Q Now, was that speech therapist white or was she black?

A She was black.

Q All right.

Now, I believe you have a guidance counselor.

A We do.

Q Now, what is the area that the guidance counselor covers?

A Working with any child that has special problems.

Q Would that include emotional problems?

A Yes.

Q All right.

What area does that cover in your Calhoun County schools?

A The grade level?

Q Right.

A We have a counselor at the high school who is a part-time counselor, we have a part-time counselor at the [158] junior high school, and we have a part-time counselor at the elementary school plus we have a counselor that works county-wide with any child that has special handicap problems.

Q Now, I believe that Mrs. Wright testified this morning that she worked in the vocational area, vocational training area.

A Vocational Rehabilitation Program.

Q In the Calhoun County schools?

A Right.

Q Now, I ask you, from what fund was she paid?

A From Calhoun County funds.

Q By whom was she employed?

A By the Calhoun County School Board.

Q Right.

Do you have funds made available from other sources to assist in that program, Mr. Burt?

A Correct. Sixty per cent of such a teacher's salary is reimbursed to us by the State Department of Education in some cases, and in Mrs. Wright's particular case it was through rehabilitation.

Q Now, do you know approximately when the Calhoun Academy was established?

A Nineteen Sixty-Eight.

Q Do you know the date of your court order?

A Nineteen Sixty-Eight was the first year of [159] integration in the public schools.

Q Of Calhoun County?

A Right.

THE COURT:

Are you familiar with the faculty of the Calhoun Academy?

THE WITNESS:

No. Calhoun Academy?

THE COURT:

Yes.

THE WITNESS:

No.

THE COURT:

Have there ever been any blacks enrolled?

THE WITNESS:

Not to my knowledge.

THE COURT:

Do you know what their policy is for admission of blacks?

THE WITNESS:

No, I do not.

THE COURT:

What is the white-black enrollment in the Calhoun City Attendance Center now, approximately?

THE WITNESS:

[160] Somewhere within a high fifty for white and —

THE COURT:
Fifty per cent?

THE WITNESS:
Yes, sir. Between fifty-five and sixty per cent white.

THE COURT:
All right.
How are those figures in Bruce?

THE WITNESS:
Basically the same.

THE COURT:
What about Vardaman?

THE WITNESS:
Vardaman, the percentage would be a higher one of whites. Some ten per cent to fifteen.

THE COURT:
All right, sir.
Go ahead, sir.

MR. HICKMAN:
Q Mr. Burt, you heard Mr. Cook's testimony this morning in regard to a report of teachers in the summer session.
A I did.
Q Are you familiar with this incident?
[161] A I am.
Q What are the circumstances?

A In February of this year, Mr. Hudson called this to my attention. He had a copy from the State Department of Education concerning summer school from the previous year where — stating the subjects taught and the teachers that were approved to teach these subjects. Mr. Hudson informed me that he taught one of these subjects instead of Coach Cook, and asked my position on it. I says, 'I am not concerned about it. I don't think you should be concerned about it. This was prior to July first, you did not make application, this is not your mistake. Don't worry about it."
Q He hadn't signed that?
A Mr. Hudson cannot sign the application for summer school.
Q He did teach the summer session?
A He did.
Q And was paid for the summer session?
A He was paid by the students.
Q Who was the principal at that time?
A Up until July the first, Mr. D. L. Harrison.
Q Now, where did Mr. Harrison go when he left the Calhoun Schools?
A He went to the private school as headmaster.
Q All right.
[162] Now, I believe you have buses that run from Calhoun City Attendance Center.
A Correct.
Q Do you have a bus that runs by Mrs. Wright's home?
A I don't know if it goes right by her home, but she lives on an established bus route and would simply be a simple matter of extending the route or the bus com-

ing by. In other words, we don't run a bus down a road if there is nobody living on a road.

Q But if her children attended public schools, would she be provided bus transportation?

A She would.

Q Mr. Burt, it has been stipulated this policy was adopted by the Board.

A It was.

Q And was the action unanimous?

A It was.

Q Did either Mr. Cook, or Mrs. Adams, or Mrs. Wright request any hearing?

A They did not.

Q Now, Mr. Burt, during the time that Mr. Cook was an employee of your system and Mr. Hudson was likewise, did you ever see any evidence of any animosity between Mr. Cook or Mr. Hudson?

[163] A I did not.

Q Was there ever any animosity between you or Mr. Cook?

A There was not.

Q Have you ever seen any animosity between Mrs. Wright or Mrs. Adams and Mr. Hudson?

A There was not.

Q Between Mrs. Wright and Mrs. Adams and you?

A There was not.

Q Now, you have told us about the special services of the guidance counselor and about the speech therapist. Now. what other special services do you have?

A We have remedial work for students who might be having a problem in keeping up on their — in certain areas. such as math and reading. We have a

special industrial arts program to where students can work in this line.

Q Do you recall any other programs or does that —

A I do not recall any more at this time.

Q Mr. Burt, are you dedicated to the desegregation in the public school system?

A I am.

MR. HICKMAN:

That's all.

THE COURT:

You may cross-examine.

[164] CROSS EXAMINATION

BY MR. FARESE:

Q Mr. Burt, are you the same John Burt who taught school in Benton County or whose father taught school at Hickory Flat —

A I am.

Q — in Benton County?

A I am.

Q Now, you are the County Superintendent of Education of Calhoun County, right?

A I am.

Q And as County Superintendent of Education, Calhoun County, being a county-wide school system, you are also secretary for the Board, right?

A Correct.

Q And when your Board passes any ordinances, or policies, or rules, or regulations, the law requires you

to place them in the minutes of the Board, right?

A I keep the minutes — my job as executive secretary is keeping the minutes of the Board meetings. And any action that is taken is in these minutes.

Q All right. That is my question. In other words, every action, every policy, every rule and regulation adopted by the Board, in order to be effective and valid, has to be placed in the minutes of that Board.

[165] A It does not.

Q Oh. In other words, you contend that the Board can speak outside of its minutes?

MR. HICKMAN:

Your Honor, we object; that's a leading conclusion.

MR. FARESE:

Your Honor, this man is County Superintendent of Education.

THE COURT:

Well, he is not a lawyer, though. I believe you have stated it was not in writing.

MR. FARESE:

Yes, sir.

THE COURT:

This policy was not in writing.

MR. FARESE:

All we know is what they said in the Answer.

THE COURT:

Well, ask him how this was formalized, then.

MR. FARESE:

Q How was this policy formulated? Who introduced it, who seconded it, who voted on it?

A I, shortly after becoming County Superintendent, went over the court order, discussed certain things pertinent [166] to this with Mr. Moore, who is the attorney for the School Board, and this policy at that time — February of 1972 — was discussed by the Calhoun County School Board.

Q I know. But my question was, when, during what Board meeting, was this adopted?

A In November — this policy was adopted in November of 1972.

Q And did you reduce it to writing?

A Did not.

Q Did you enter it in the minutes of the —

A We did not.

MR. FARESE:

Now, Your Honor, at this time I am going to object to the introduction of any policy on the grounds that the Board can only speak through its minutes.

MR. HICKMAN:

We have stipulated as to the policy.

MR. FARESE:

No, sir.

MR. HICKMAN:
That the policy was adopted in 1972. That was the only issue in this case.

MR. FARESE:
Your Honor, the —

THE COURT:
[167] I understand what you are saying.

MR. FARESE:
Stipulation was that in their Answer, the verbiage that they put in, and we quoted that verbiage —

THE COURT:
You are saying it was ineffective because it was not officially written in the minutes?

MR. FARESE:
That's exactly right.

THE COURT:
I will reserve ruling. Go ahead.

MR. FARESE:
All right.
Q Now, Mr. Burt, you will tell the Court that nowhere on the minutes of the Board of Education of Calhoun County is there any policy?
A No, not to my knowledge.
Q You are the custodian of the records, aren't you?
A Yes, sir.
Q Won't you absolutely say that there is not, then?

A There is not.
Q All right.
Now, before you were elected County Superintendent [168] of Education, how was the school system operating in Calhoun County?
A Well, I thought — Mr. Farese, I thought it needed some new blood. I thought it needed me for superintendent or I would have never announced.
Q So you felt that it was in pretty bad shape, right?
A I did not say that.
Q Well, you said it needed new blood and that that's why you ran. You did say that.
A I did say that.
Q Then will you please answer my question. How was the school system operating in Calhoun County with the man that you supplanted?
A I don't understand the question. How was it operating?
Q Yes, sir.
A The same way that it's operating now.
Q All right.
A With a school board and superintendent of education.
Q You weren't having any troubles, were you?
A I wouldn't say that.
Q Well, I am talking about the particular problem that we are talking about in this lawsuit.
[169] A Definitely there were problems concerning this.
Q All right.
Let's talk about your teachers. You know Mrs. Wright, don't you?
A Very well.

Q Didn't you actually tell Mrs. Wright in front of her class that she was an outstanding teacher?

A I informed Mrs. Wright of the School Board's policy and I told Mrs. Wright that there was only one issue here. This was the fact that her child was in the private school. There was no other issue as far as she was concerned and the fact that I was not recommending her. Prior to making this statement —

Q Excuse me, sir. You don't recommend the teachers, do you?

A I do recommend the teachers to the School Board.

Q Now, let's go back. Isn't it a fact that under the law the principal recommends them, they go to you?

A The principal recommends to me, my interpretation of the law.

Q That's right. He recommends to you.

A I can accept or reject his recommendation and make my own.

Q Well, no, sir. Do you tell the Court that you understand the law to be, as county superintendent, that you [170] have the right to recommend a teacher?

A I can reject the recommendation of the principal.

Q I am not talking about the principal. I am talking about a teacher. I am talking about Mrs. Wright specifically. You do not have that right of recommendation, do you?

A Following the recommendation of the principal, then I have the right to reject or recommend.

Q That's right. But the initial recommendation must be made by the principal?

A By the principal.

Q And you have no right to make an initial recommendation for a teacher, do you?

A Mr. Farese, I was going to explain that when you interrupted me.

Q Oh, excuse me.

A I went to Mrs. Wright and suggested that she go discuss this thing with Mr. Hudson. Mrs. Wright refused and this was then what I told Mrs. Wright. "Then, if you don't go see him, Mr. Hudson is not going to recommend you; therefore, I will not be able to recommend you and you will not, in essence, have a job next year."

Q So that you and Mr. *Wright* had gotten together and if they didn't do what you told them to do, he, the principal, would not recommend them; is that what you are telling [171] us?

A I did not. I did not get together with Mr. *Wright*.

Q Well, then on what did you base the fact that if she didn't pull her children out of the private school that she would not —

A On the fact that —

Q Excuse me.

A On the fact that teachers were recommended, we withheld recommendations on Mrs. Wright to a later Board meeting.

Q How about Mr. Hamblin?

A Mr. Hamblin was recommended at that time.

Q Well, he has children in private schools?

A He did not have at that time.

Q Well, did you inform him of the school policy that he would not be employed, would not be re-employed if his children went to a private school?

A I did not. It was common knowledge that this policy was in effect once it was put in effect in November. But he was recommended in March, prior to this date. He had his contract when this policy went in, he has been notified at this time that he will not be re-employed if his children are in the private school.

Q But, Mr. Burt, you talk about a policy. Where [172] could these people read about this so-called policy?

A It was general knowledge that they knew of this, this policy.

Q Mr. Burt, I am not talking about general knowledge, I am not talking about the grapevine, I am not talking about word of mouth. My question was: Where could these teachers go to see an official policy adopted by you, Mr. Hudson, or the County School Board relative —

A I have already admitted that it was not in the minutes.

Q All right, sir. Then, why don't you answer, sir?

A Why should I answer the same question? I thought that question had already been answered.

Q When did you inform Mr. Hamblin?

A The same day that I learned that his children were in the private school.

Q Well, you —

A Which was —

Q Excuse me, sir.

A — one day this week.

Q You knew that Mr. Hamblin's children had previously attended a private school, didn't you, last year?

A They did not.

Q Didn't you know that they attended Magnolia?

A I am under the impression that's a state-supported [173] school. This school has access to state funds, according to my reports.

Q Where did you get those reports, Mr. Burt?

A (No oral response)

Q Where did you get those reports that Magnolia is not a private school?

A From my discussions with Mr. Hamblin and in prior conversations concerning his children and their special problems that they were having.

Q And don't you know that Magnolia School is a private school and it requires tuition to be paid by the parents for their children to go there?

A I also know that it's eligible for Federal funds.

MR. HICKMAN:

Your Honor, we object. That has not been established, that Magnolia —

MR. FARESE:

Your Honor, this is the superintendent. He has adopted a policy. I am asking him about the teachers and if he has made an investigation.

THE WITNESS:

I have notified Mr. Hamblin that he would not be re-employed.

THE COURT:

Now, his children are in what school at this [174] time?

THE WITNESS:
In Calhoun Academy at this time.

THE COURT:
Are these the ones with the hearing problems?

THE WITNESS:
Correct.

THE COURT:
Last year they were in another school?

THE WITNESS:
Magnolia School for the —

THE COURT:
Where is that located?

THE WITNESS:
In Jackson.

THE COURT:
All right.

THE WITNESS:
I might — my basis for the belief that this school was a public school was the fact that it had access to Federal funds. Private schools I am sure do have access to Federal funds in some situations.

MR. FARESE:
Q So you made no investigation of your own?

A Investigation concerning what?
[175] Q Whether or not Magnolia was a private school.
A Yes, I did.
Q Well, if you made an investigation then you should determine whether or not it was or was not a private school.
A I have stated that it was not.
Q And that is your testimony under oath?
A Uh-huh.
Q All right, sir.
Now, tell me, in August of 1972, did you tell Mrs. Wright that Mr. Hudson had made the decision that no teacher could teach in the public school unless they sent their children and that it was his decision and that you had to back him up?
A In August of '72 it was not a school board policy. I don't remember telling Mrs. Wright. I can't answer that question. I don't remember telling Mrs. Wright that.
Q All right. Let me refresh your recollection. In May of 1972, did you tell Mrs. Wright, this woman sitting right here, that Mr. Hudson had made the decision about the teachers sending their children to public schools and it was your duty to back him up? Did you tell her that?
A I do not remember telling Mrs. Wright that.
Q Do you deny that you told her that?
[176] A I do not remember telling her.
Q Do you deny it?
A I do not deny it.
Q All right.
Now, you talk about you believe in total, complete integration. You said that, didn't you?

A I stated that I was totally dedicated to a desegregated school system in Calhoun County.

Q All right. Let's talk about that. How about the all-white class that you have in the elementary school there?

A We do not have any all-white classes, to my knowledge.

Q You tell this Court that you are not aware of that fact?

A I am telling this Court that we do not have any, to my knowledge.

Q You talked about counselors that you have at the school. Who are these counselors?

A Billy Wells, Billy Jack Stewart and Jim Potts.

Q And what are their training in this particular field?

A Two of them has a master's degree in counselling and one of them is presently working on a master's degree and has a certificate.

[177] Q Mr. Burt, have you ever told Mrs. Wright that there was no place in Mississippi for private schools?

A No.

Q Did you ever tell her there was no place in Calhoun County for a private school?

A (No oral response)

Q You are hesitating, Mr. Burt.

A I — I can't answer it. I don't know.

Q Well, you certainly would know whether or not you said that, wouldn't you?

A I certainly don't know whether or not I said it or I would not have said that I didn't know.

Q So you could have said it, right?

A I could have said it. And if —

Q Excuse me?

A I might add this. My opinion — Mrs. Wright and I have known each other a long time, just as many other people. I am a person that will state my opinion. And as to the fact — do we need a private school in Calhoun County? — we don't need one.

Q Now, when —

A Mrs. Wright may need one, but we don't need one.

Q When you say "we," what about the people who see fit to send their children to a private school?

A Then —

[178] Q Do you believe that they are entitled to do that?

A I do.

Q All right, sir.

Now, do you know whether any black has ever applied for admission to the Calhoun Academy?

A I do not.

Q So you don't know whether or not they would be admitted, do you?

A I do not.

Q All right, sir.

Now, let's talk a little about Mr. Roger teaching in the summer month and he took it up with you. You had no objection. That's what you said, didn't you?

A I told him that as far as he was concerned that he didn't sign the application, to forget it.

Q You knew that he was not qualified to teach that subject, he didn't have a certificate to teach it. You knew that, didn't you?

A I knew that Mr. Hudson's certificate — ask the question again.

Q You knew that Mr. Hudson was not qualified to teach history because he didn't have a certificate to teach it —

A I did not know that. I only knew that Mr. [179] Hudson had a certificate that qualified him for the principal. That was all I was concerned with.

Q Mr. Burt, please, sir, so we can get on. I am talking about this incident when he taught in the summer school under Coach Billy Cook's certificate.

A I am not denying that he did that, but I didn't check his certificate to see if he was qualified to teach it. My instructions to Mr. Hudson were, "You didn't make the application, don't worry about it."

Q But my question is: You knew that he had taught in the summer school session, didn't you?

A Yes.

Q You knew that he had taught history and that he was not qualified to teach history?

A I did not know that he was not qualified to teach history.

Q If he was not qualified, why was it necessary for him to teach under his certificate?

A Mr. Farese, I might answer that in this manner.

Q All right, sir.

A I don't check everything. I depend on the people that are working under me to do some checking. I felt like that this form was — that there was a mistake made in some manner, and I was not concerned about the mistake.

Q All right. Then let me ask you, as County [180] Superintendent of Education of Calhoun County, assume that one of your principals took it upon himself to teach a history class in summer school ses-

sion when he was not qualified, used the certificate and name of another teacher and received that money himself, would you condone such an action?

A I do not approve of anyone teaching any subject that they are not qualified to teach. Does that answer your question?

Q No, sir. My question was: Would you condone such an action? Yes or no and then you may explain.

A I would not condone that.

Q Then why did you tell him it was all right?

A Because Mr. Hudson was not the one that made the application for summer school.

Q He got the money, didn't he?

A He did the work.

Q Yes, sir. But he wasn't qualified to do it, was he?

A That I have admitted that I do not approve of.

Q Okay. As long as you don't approve of it, we agree.

Now, did you ever, during your period as superintendent or principal, learn that Mrs. Wright was not doing a competent job?

A I felt that Mrs. Wright — the fact that Mrs. [181] Wright's children were in a private school affected the job that she was doing.

Q Well, my question was, now, and if you will answer it we will get on: Did you find that Mrs. Wright was not doing a qualified job as a teacher in the system that she had taught in for six years?

A I did not have any complaint against Mrs. Wright in the fact except that I thought that this affected her as a teacher.

Q And didn't you agree with your attorneys that all of these teachers were qualified and the only question was whether or not the policy was —

A I did.
Q And you are not going to backtrack from that?
A I'm not going to.

MR. FARESE:
We have no further questions.

THE COURT:
Any redirect?
You may stand down, sir.
Will counsel approach the bench.

(Recess)

THE COURT:
All right, sir.

[182] MR. HICKMAN:
Mr. R. W. Mallory.

MR. FARESE:
Your Honor, to expedite the hearing, I understand that this witness is a school board member and he would testify that orally they made this but it was never reduced to writing and there is no official record in any of the minutes. If that is what he would testify to, we would stipulate to it.

MR. HICKMAN:
Well, now, in addition, he would testify to that testimony by Mr. Burt that they were operating under a court order and following the court order and for the reasons expressed by Mr. Burt this policy was adopted.

MR. FARESE:
And, of course, would his answers be the same as Mr. Burt's, that the only reason that these teachers were not re-hired was because —

MR. MALLORY:
Yes.

MR. FARESE:
All right. We will stipulate.

MR. HICKMAN:
Is that clear — let the record show this witness is the president of the Calhoun County Board.

[183] THE COURT:
President of the Board?

MR. HICKMAN:
Yes, sir, he is president of the board.

THE COURT:
All right.

MR. HICKMAN:
We will call Mr. Billy Potts.

MR. FARESE:
Your Honor, again, to expedite, I understand that this witness would testify that he is a guidance counselor and that these programs about which they have previously testified are available in the public

schools, with which we find no fault. We would stipulate to that.

MR. HICKMAN:
Further stipulation that he was counselor for grades one through junior high and that in his capacity —

THE COURT:
Guidance counselor?

MR. HICKMAN:
Yes, sir. And that students from grades one through junior high would have been under his supervision and would have come to him if they had had any problems including emotional impediments, speech and otherwise.

THE COURT:
[184] All right. Emotional problems are part of his program?

MR. HICKMAN:
That's right.

MR. FARESE:
All right. Now, Your honor, we would agree and stipulate to all of that, but I would want to examine this man on one field other than those stipulations.

MR. HICKMAN:
Well, there is only one other stipulation we would like. That is the number of students that are in the first grade.

MR. FARESE:
Put him on for that.

JAMES W. "BILLY" POTTS,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HICKMAN:
Q Mr. Potts, your position is —
A I am the Assistant Principal of Calhoun City Attendance Center, in charge of elementary school, guidance and counselling.
Q All right.
[185] A Now, are you familiar with the number of first grade students that's in Calhoun City schools?
A This year?
Q Yes.
A We have approximately 108.
Q How many in each class?
A Approximately 26 to 28 per section.
Q In the first grade?
A In the first grade.

THE COURT:
How are they racially?

THE WITNESS:
Sir?

THE COURT:
What is the racial ratio?

THE WITNESS:
It is — in each section?

THE COURT:
Yes.

THE WITNESS:
The ratio cannot exceed ten per cent above the percentage in the class — in the first grade, nor may it be less than ten per cent —

THE COURT:
Well, could you convert that into figures? You [186] say you have 26 to 28 in a class. What is your black-to-white ratio?

THE WITNESS:
It's close to 50-50 just about, because the first grade is pretty well equal.

THE COURT:
All right, sir.

CROSS-EXAMINATION

BY MR. FARESE:
Q Mr. Potts, before you came to Calhoun County, where did you teach?
A I was the guidance counselor at Monthly (phonetically) High School.
Q Where is that?
A Lowndes County School System.

Q Do you have children?
A Yes, sir.
Q How many?
A One.
Q Girl or boy?
A Girl.
Q Where did the girl go to school?
A At Starkville.
Q To a private school, didn't she?
[187] A Yes, sir, but —
Q Now — all right, go ahead.
A It wasn't for the reasons that you are trying to stipulate.
Q I didn't say any reasons, Mr. Potts.

THE COURT:
What was the reason?

THE WITNESS:
It was because of the racial trouble that they were having in Starkville at the time she came of school age.

MR. FARESE:
Q In other words, you saw fit to send your own child to a private school because of the integration of Lowndes County schools, right?
A No, sir.
Q Well, why?
A Starkville is not in Lowndes County.
Q Well, all right. Oktibbeha?
A Oktibbeha.
Q All right.

A And this was for the Starkville Separate School District. And it wasn't because of the integration but it was because of the trouble that they were having in the schools.

Q I didn't ask you why, the because; I just asked you: Did you send your child to a private school?

[188] A Yes, sir.

Q Did you think there was anything wrong in you sending this child to a private school?

A For my reasons, no, sir.

Q All right. In other words, you do agree that there might be reasons why a child should be allowed to go to a private school, such as your reasons?

A As long — yeah.

Q In other words, —

A Specific reasons.

Q In other words, if they are good enough for you, they are good enough for other teachers, right?

A If the private schools are good enough for me?

Q No, sir. If your reasons were good enough for you to send your child to a private school, they are good enough for other teachers, if they have adequate reasons. You would agree with that, wouldn't you?

A Well, now, of course, with the stipulation that I don't know what the other teachers' reasons are, yes, sir.

Q I understand that, sir. My question is simply this. That you considered that you had adequate reasons to send your child to a private school under the conditions and circumstances then existing; right?

A At that time, yes, sir.

Q And you felt you were justified in doing that,

[189] right?

A At that time, yes, sir.

Q Yes, sir.

Now, you wouldn't quarrel with the fact that other teachers who have children might have reasons to send their children to a private school?

A I wouldn't quarrel with it.

Q No, sir.

A But may I make something —

Q Mr. Potts, you can say anything you want to as far as I am concerned.

A Thank you very much.

Q Yes, sir. Go ahead.

A I was — at the end of the 1972 school session, before I was asked to come to this county, I had already pulled my child out of private school and placed her in public school. And also, the county that I was teaching in had no ruling against my child being in a private school and me being in a public school.

Q Do you know of any other county that has a ruling such as Calhoun County?

A I know of several school districts, yes, sir.

Q I am asking you about a county rule.

A County rule? I don't know.

Q Now, this school that you sent your child to in

[190] Starkville was an all-white school, wasn't it?

A Yes, sir.

Q All right.

Now, Mr. Potts, you are familiar with the school classes in Calhoun County, aren't you?

A The county as a whole, no, sir. I can't say for sure, no, sir.

Q Let's limit it to Calhoun City.

A Yes, sir.

Q Your attendance center there. You will tell the Court, won't you, that you have an all-white choir? That's true, isn't it?

A I'm not really sure, sir.

Q Mr. Potts, you are a guidance counselor and you can't tell the Court whether or not that is actually so?

A To my knowledge, they do have an all-white choir.

Q All right. That's fair enough.

Now, Mr. Potts, you will also tell the Court, won't you, that in the classes in the Calhoun Attendance Center that there are many classes which are predominantly white because the intelligent children were placed in that class? You will agree with me there, won't you?

A On what grade level, sir?

Q On the elementary grade level.

[191] A No, sir, I wouldn't agree.

Q Would you agree on the junior high level?

A No, sir, I wouldn't agree with that.

Q Would you agree on the high school level?

A No, sir, I wouldn't agree with that.

Q Well, would you tell the Court if it isn't a fact that you had a child that was placed in one class because of a test or series of tests and that you were dissatisfied and you had that child put in another class? That's true, isn't it?

A I — I don't know. I couldn't answer that because I don't know what child you are talking about.

Q Well, did you have any child who was previously put in a class with which you were dissatisfied and you had that child removed to a higher level class?

THE COURT:

How is that material?

MR. HICKMAN:

Your Honor, we object. That's not relevant to this —

MR. FARESE:

I am talking about his own child, Your Honor.

THE COURT:

I thought you were talking about how the public school operates. I sustain the objection.

[192] MR. FARESE:

All right.

Your Honor, we have no further questions.

THE COURT:

Any redirect?

MR. HICKMAN:

Just one or two.

REDIRECT EXAMINATION

BY MR. HICKMAN:

Q Mr. Potts, you are familiar with the policy existing in the Calhoun County schools now?

A Yes, sir, I am familiar with them.

Q Are you totally dedicated to the desegregation —

MR. FARESE:
Your Honor, we would object. This is redirect. This was not brought out on cross-examination.

MR. HICKMAN:
Well, we tried to stipulate to expedite. He has raised some questions here and I think we are entitled to respond.

THE COURT:
I believe you opened the door.

MR. FARESE:
All right.

[193] THE COURT:
You may ask him.

MR. HICKMAN:
Q Are you totally committed and dedicated to a public school system in Calhoun County?
A Yes, sir.
Q Do you agree and adhere to the policy that is in effect in Calhoun County?
A Yes, sir.
Q Have you had occasion to observe teachers in the system since you have been there?
A All day long every school day.
Q Have you formed an opinion as to whether a teacher that teaches in the Calhoun County school and has a student in a private school, whether it affects her performance or efficiency?

MR. FARESE:
Now, may it please the Court, we didn't go into that.

THE COURT:
I will let you go into it.

MR. HICKMAN:
Q Do you have an opinion?
A Yes, sir, I have an opinion.
Q What is your opinion?
[194] A I believe that a teacher that has a child in a private school, whether consciously or unconsciously, I don't know, is affected by attitude towards the child, materials taught, is affected in all ways concerning the education of that child.
Q Have you had an occasion to hear any conversation of teachers in the Calhoun City Schools which would substantiate your opinion?
A Yes, sir.

MR. FARESE:
Your Honor, we would object to any hearsay.

THE COURT:
Sustained.

MR. HICKMAN:
I believe that's all.

THE COURT:
Any recross?

RECROSS-EXAMINATION

BY MR. FARESE:

Q Mr. Potts, you said you believe that the children would be affected. Have you ever seen this?

A Yes, sir.

Q Name me specifics.

A You want children's names?

[195] Q Yes, sir.

A I'm sorry, sir, I can't give you a specific child's name.

Q Well, if it was —

A I can give you instances. And it wasn't told to me.

Q I am asking you about the child's name and the circumstances. If you don't know the name, tell me you don't know.

A I don't know the name.

Q All right.

A Instances in the tutorial program that we have in our elementary school whereby we teach children that are having reading difficulties, reading trouble, I have seen on several occasions where the teacher — aide, excuse me, would extremely pounce on a child that may be missing a word. Instead of trying to help him, would really tear a child down.

Q Mr. Potts, my question was: Do you know of any instances where the students were affected by the teacher sending their child to a private school when the teacher taught in a public school? That was my question.

A Are you talking about a regular classroom teacher now?

Q Yes, sir.

A No, I don't have any classroom teachers that have [196] children in private school.

Q So you don't know whether or not —

A I'm sorry, I misunderstood. I thought you were talking about my total faculty.

Q I'm talking about this present situation. You don't know of any instances, do you?

A No, because I have no teachers with children in private school.

Q Did you teach there when teachers had children in private school?

A No, sir.

Q You are teaching there now, Mr. Potts?

A I have no teachers under me with children in the private school.

Q I am not talking about teachers under you. I am talking about teachers in the Calhoun Attendance Center.

A I can't observe something I am not directly concerned with.

Q Well, then, you don't know, do you?

A No, sir.

MR. FARESE:

All right.

I have no further questions.

THE COURT:

Anything further of this witness?

[197] MR. HICKMAN:

No, we don't have anything.

THE COURT:
You may stand down.

MR. HICKMAN:
We call Mr. Paul Moore.

PAUL M. MOORE,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HICKMAN:
Q Would you state your name.
A I am Paul M. Moore.
Q And your address?
A 311 North Main Street, Calhoun City, Mississippi.
Q I believe, Mr. Moore, that you are the attorney for the Calhoun County School Board.
A That's correct, sir.

MR. HICKMAN:
May I have this marked for identification?

THE CLERK:
Defendant's Exhibit Number Five and Defendant's Exhibit Number Six for identification.

MR. HICKMAN:
[198] Q Mr. Moore, in your capacity as attorney for the County Board of Education, did you represent the Board in its desegregation case in this Court?
A I was of counsel, yes.

Q All right. And you are familiar with the court order —
A I am, sir.
Q And you, as I understand, conferred with the Board in implementing the court's order.
A That's right, sir.
Q Now, I refer you to Exhibit Five for the Defendant, marked for identification. Can you identify that?
A Yes, sir. It's a letter dated October 9, 1972 — or, rather, it is a carbon copy of a letter of that date, written by me as attorney for the school board, and the superintendent of education to Honorable David L. Norman, Assistant Attorney General, Civil Rights Division, United States Department of Justice, Washington, D.C.
Q Now, Mr. Moore in your case that is still pending in this court, who is the plaintiff?
A The Department of Justice. United States of America, through the Department of Justice.
Q All right.
In the letter, what did you seek from Mr. Norman?
[199] A I received a letter from him dated November 6, 1972, which is Exhibit Six.
Q All right.
Now, refer to Exhibit Five. In this letter which you have identified and directed to Mr. Norman, what did you request of Mr. Norman?
A Do I understand you want me to read the letter or do you want me just to summarize it?
Q Just summarize it.
A I requested that Mr. Norman advise me, as attorney for the school board, and the school board as to whether or not in the opinion of the Department of

Justice the school board would be within its prerogative under the court order not to renew their contracts with teachers when they come up for renewal, which is normally in March of 1973, if they had children in private school.

Q All right. And that was the substance of your request from Mr. Norman?

A That's right, sir.

Q Now I direct you to Exhibit Six for the Defendant. Is this a response to your correspondence?

A It is, sir.

Q Now, will you give the substance of that response that you received?

A The substance of the response is that orders [200] entered by this court would not preclude the school board from taking the action described in your letter. Indeed, as your letter correctly notes, the court in its ruling from the bench on August 7, 1968, made several references to the board's obligation to take positive and affirmative steps. As was pointed out by Chief Justice Burger in the case cited, school boards that operate dual school systems are charged with affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Q And if you will, read the last paragraph of that letter.

A (Witness reading the last paragraph of the letter)

Q Mr. Moore, after receiving this correspondence identified as Exhibit Six, did you counsel with the board?

A I did, sir.

Q And with the superintendent?

A I did, sir.

Q In regard to the policy which is the subject of this hearing?

A That's right, sir.

Q And did you give them an opinion?

A I did, sir.

Q And what was that opinion?

A That in my opinion that they could adopt the [201] policy and it was necessary to adopt the policy to further the orders of the court now pending against the board of education.

MR. HICKMAN:

I offer in evidence Defendant's Exhibits Five and Six to the testimony of Mr. Moore.

THE COURT:

Let them be received.

MR. HICKMAN:

That's all.

THE COURT:

You may cross-examine.

CROSS-EXAMINATION

BY MR. FARESE:

Q Now, Mr. Moore, what did you interpret the last paragraph of that letter to mean? Would you read it again, please.

A (Witness reading the last paragraph of the letter)

Q Now, what did you, as a lawyer, interpret that paragraph to mean?

A I interpreted it to mean exactly what it said, and that is that they were not getting off into that area whatsoever in the answer to me.

[202] Q Now, would it be fair to say that what that paragraph says is that the Department of Justice is not saying that you are violating the due process and First Amendment rights of these teachers?

A That would not be my interpretation.

Q Well, why was it put there?

A Because they said they were not getting into that area.

Q Well, is it a questionable area?

A Well, I would suppose they had reasons for not getting in it. They didn't spell out what the reasons were.

Q Well, when you gave the board — oh, excuse me. They didn't spell out the reasons. But when you saw that red lighted last paragraph, did you check any law to properly advise your board?

A Do what?

Q Did you check into the Supreme Court decisions relative to the First Amendment and due process?

MR. HICKMAN:

Your Honor, we are going to object to that. He has testified that he — in response to the letter he got the opinion and he advised the board based on this opinion.

THE COURT:

Well, I think you have opened it up. I will let him go into it.

[203] MR. FARESE:

Q Did you do that, Mr. Moore?

A Would you ask the question again, please?

Q Did you go into the question whether or not the due process of the First Amendment rights of these plaintiffs were being jeopardized and abridged?

A Did I go into it with the school board?

Q Did you go into it as attorney for the school board before you advised the school board that their action was valid, and Constitutional, and right?

A I considered I had, yes.

Q Did you read *Green vs. Connally*, cited in 330 F.Supp. 1150, 1971 case?

A Yes, sir, I have read it, sir.

Q You have read that case?

A Yes, sir, I have read it.

Q Did you read that portion of it that says, "The general right of association is protected no matter how unpopular the group's purposes or characteristics may be. Indeed, one has the Constitutional right to belong to political groups embracing both legal and illegal aims so long as it does not intend to engage in acts in furtherance of any unlawful purposes"? Did you read that?

A I agree with the law of that case, yes, sir, but I don't agree with the interpretation you might put on it.

[204] Q Do you agree with the Supreme Court decisions —

THE COURT:
Mr. Farese, it is not time for a final argument yet.

MR. FARESE:
All right, sir.

Q Then, Mr. Moore, as attorney for the school board, you are familiar with the rules and regulations regarding the acts of school board members, aren't you?

A Well, I don't know what you are speaking of. I try to keep myself abreast, if that's what you mean.

Q All right, sir.

You and I went to school together at Ole Miss about the same time?

A I believe we did.

Q Yes, sir. All right. And you have been an attorney for the Board of Education for many years?

A Quite a few, yes, sir.

Q How many years, sir?

A I believe they came into existence in '58 or '56, I forgot which.

Q So you and I have been school board attorneys about the same number of years?

A That's right.

Q Now, don't you know, Mr. Moore, as a matter of [205] fact and won't you agree that the school board speaks only through its minutes?

A No, I will not agree.

Q You didn't know that?

A Uh-huh.

MR. FARESE:
I have no further questions of this witness.

THE COURT:
You may stand down, Mr. Moore.

MR. HICKMAN:
We rest.

THE COURT:
Before you rest your case, are you gentlemen in a position to make a stipulation as to Calhoun Academy?

MR. FARESE:
No, sir. I think that the testimony from the witness stand is that no black person has ever applied for admission there.

MR. HICKMAN:
He testified, too, Your Honor, if they applied they wouldn't let them in.

THE COURT:
One witness said that.

MR. FARESE:
But he was only the headmaster. They have a [206] board of admissions that decides whether or not —

THE COURT:
Are you in a position to make a stipulation on that?

MR. FARESE:
No, sir.

THE COURT:
All right.
Any rebuttal evidence?

MR. FARESE:
No, sir, we have nothing.
Your Honor, for the purpose of the record, at the conclusion of the school board's case, we move to strike any alleged policy. There has been no proof that it was adopted legally by the board and inserted in the minutes of the board. And we take the position that the board — County School Board of Education acts only through its minutes and speaks only through its minutes.

THE COURT:
That objection is overruled.

MR. FARESE:
All right, sir.

THE COURT:
All right, gentlemen. Anything further?

MR. FARESE:
[207] Your Honor, he is raising a question and I am willing to —

MR. HICKMAN:
No, I rest.

THE COURT:
All right.

MR. FARESE:
Your Honor, I think we can solve these two questions for the record. We will put the president of the board on as an adverse witness. Just a couple of questions.

THE COURT:
All right.

R. W. MALLORY,
being first duly sworn, was examined and testified as follows:

RECROSS EXAMINATION

BY MR. FARESE:
Q Your name, sir?
A R. W. Mallory.
Q You are president of the school board, are you not, sir?
A Yes, sir.
Q The policy that you adopted, you heard them say that was it, period, and that's what your board adopted, right?
[208] A Yes, sir.
Q And if they didn't take them out, it didn't matter what, they were just not going to be re-employed or rehired, is that —

MR. HICKMAN:
Your Honor, we object. This isn't proper rebuttal. He was on the stand, that could have been asked at that time. This is not proper rebuttal.

MR. FARESE:

Your Honor, we are getting to a question of whether or not it was futile for these people to have asked for any further hearings. And I asked him if he would stipulate to that. At first he said yes, but since he says no, I want to show that it wouldn't —

THE COURT:

Well, I will allow it. Let's see what he says.

MR. FARESE:

Q Now, that's true, isn't it?

A Run that back.

Q All right, Mr. Mallory, I'll run it over again. You all decided, as you said, and as was stipulated, that if the teachers didn't pull their children out of the private school, regardless, they would not be rehired. That's true, isn't it?

A I don't know about regardless. We are just [209] talking about the — just making this a policy and that's what we did.

Q Well, that's what it was, a blanket policy, right?

A Yes, sir.

Q And it didn't matter, if they refused to pull them out then they would not be re-hired, right?

A Well, we didn't go into what could have been a reason or anything like that, I mean, that wasn't discussed, you know. It was just a policy, that's all.

MR. FARESE:

Then, Your Honor, we go into another gray field.

THE WITNESS:

We just — that was just the policy, that if a teacher had a kid in private school they wouldn't be re-hired.

MR. FARESE:

Q That's it?

A We didn't discuss anything else.

MR. HICKMAN:

Now, he has discussed the policy. There hasn't been any question raised that the policy is in effect. He stated what the policy was.

MR. FARESE:

We have no further questions of this witness.

THE COURT:

[210] All right.

Would it mean any private school? Is that what you understand the policy to be?

THE WITNESS:

Of course, we was just concerned —

THE COURT:

What school were you talking about?

THE WITNESS:

We were concerned with Calhoun Academy because that's the school that's in the county, the only one.

THE COURT:

Was any other private school ever in consideration?

THE WITNESS:
There was no other one discussed. No other one involved.

THE COURT:
Well, why were you concerned about Calhoun Academy?

THE WITNESS:
That's where these kids were going. I mean, there's — as far as we knew, you know. We didn't say specifically Calhoun Academy or anything, we just said if they had a kid in private school. Or in another school, as the policy says. That's all we stated.

THE COURT:
[211] What is the Calhoun Academy? Do you know?

THE WITNESS:
It's a private school.

THE COURT:
Do you know what its makeup is?

THE WITNESS:
Just kids over the county.

THE COURT:
Well, is it dedicated to educating children of one race or not? Or do you know?

THE WITNESS:
That's my opinion. I don't know.

THE COURT:
All right.

MR. FARESE:
Your Honor, in view of that, one more question.
Q Do you know whether or not any black student has ever applied there?
A No, sir, I don't know.
Q Do you know if a black student ever applied or if he were to apply whether or not he would be admitted or not?
A I don't know anything about their policies.

MR. FARESE:
All right, sir.
Your Honor, we have no further questions.

[212] THE COURT:
All right.
Gentlemen, it is now four o'clock. Do you want to submit it on briefs or do you want to argue it orally?

MR. HICKMAN:
We would submit it on briefs at this late hour, Your Honor.

MR. FARESE:
Your Honor, what does the Court desire?

THE COURT:
Well, the Court would like enlightenment from counsel in the best way possible. To my knowledge, there is no case in point. If you have one, you know,

factually in point — is not this more or less a case of first impression?

MR. FARESE:
Yes, sir.

THE COURT:
Well, I think in view of that and the importance of the issues to both sides that briefs would be in order. There are several issues in the case, not just one. It may be inappropriate for me to outline what I think they are at this time. I would like to get the wisdom of counsel before I go further.

May I make this suggestion? Each side submit proposed findings of fact, which should not be difficult in [213] this case, within one week simultaneously. How much time do you want to submit a legal memorandum for the plaintiff, Mr. Farese?

MR. FARESE:
Your Honor, two weeks.

THE COURT:
That is reasonable.
Would you like two weeks?

MR. HICKMAN:
Be fine.

THE COURT:
And then a week for rejoinder, if you wish.
It has been an interesting case and, as I say, I welcome all the light that you gentlemen can give me

on the point. I believe that is about as far as we can go today.

MR. FARESE:
Your Honor, before you adjourn, to help us in preparing the necessary brief and in an attempt to enlighten the Court, would you tell us what issues, maybe one, two, three?

THE COURT:
You want a reading of the Court's mind?

MR. FARESE:
Yes, sir. I want to see where our thrust will be.

[214] THE COURT:
Would that be helpful to you, too?

MR. HICKMAN:
Yes, sir.

THE COURT:
These are at-random thoughts from listening to the evidence. The first would be: How persuasive is this affirmative duty of a school board to bring about a unitary school system? How far does it go? I do not think it has ever been defined with precision. Usually a Federal Court is prodding a school board to do something more. This case is a little different. The question here is whether or not the school board has gone too far.

Another question that is concerning me is: What is the Constitutional limit that a board can place on the

right of an otherwise qualified teacher to teach in the public schools? If that teacher is a parent and if there are limitations that can be lawfully imposed, what is the extent of it? Could it go so far as to violate First Amendment rights where there are religious scruples at stake on the part of the public school teacher? Must he or she forego his or her right to exercise a First Amendment right that would include inculcating his or her child with a special brand of religion not taught in the public school?

A third aspect of it is: As these teachers come [215] up for consideration, are they entitled to individualized treatment? What is it that makes it unsatisfactory for them to send their children to public school whether or not there are good reasons in individual cases? Must due process in carrying out even a policy reasonable on its face mean that individualized consideration may not be given to each teacher to see whether or not there are solid, substantial and reasonable grounds?

Then another question in the case is: Assuming the School Board has the authority to make a blanket policy, is it one that would be effective as to a private school that practices racially non-discriminatory policies? I would think the recent textbook case in Mississippi might have something to say on that.

And then the question: Are the teachers here at suit in a position of being persons who are sending their children to a school which is in fact racially discriminatory? Should that determination be made initially by the School Board or by this Court?

Those are just a few questions that strike me after listening to the evidence. So you do have the due

process notion, you have First Amendment, although I haven't heard any First Amendment scruples expressed today, as I recall. Freedom of religion. I do not believe I have heard that brought forward, but I can certainly see that that [216] is a Constitutional right that may belong even to public school teachers.

I am not saying that those are the dispositive issues, but they are some of the things that cross my mind.

And another important thing in my thinking is: What is the characterization of Calhoun Academy? Is it a private school that is racially non-discriminatory or is it one that is discriminatory? That is a question of fact. That could be an important question of fact in this case. Counsel have not provided the Court with the full answer to that. There is some evidence here, but this Court will want to be sure, since the academy is not before it, an injustice is not done. Counsel should be able to determine whether the academy has applied for, and obtained, free textbooks, although that is not necessarily definitive of the question.

You can see from some of my questions that there are matters of fact here that possibly a court should not be called on to decide until the Board has decided. I do not know where that leaves you. You asked for a few inquiries and I gave you a few. So that will keep you busy.

MR. FARESE:

Your Honor, one other question. Does the Court overlook the fact that the school board does absolutely speak solely through its minutes?

THE COURT:
[217] That is one way it can speak. It can speak another way.

MR. FARESE:
All right. Well, if you are not concerned with that—

THE COURT:
No, I am not concerned with that. You are not trying to fix a contract liability. That is a good rule of law, but it is within limits. But a board can be held by its acts, you know. It has been held by its acts, even if it never speaks at all.

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[3] [Title Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS OF OCTOBER 12, 1973

[Filed: Dec. 17, 1973]

The following proceedings were had in the United States District Court, Northern District of Mississippi, on October 12, 1973, before The Honorable William C. Keady, Chief Judge, at Oxford, Mississippi.

APPEARANCE:

For the Plaintiffs:
The Honorable John B. Farese

For the Defendants:
The Honorable Will A. Hickman
The Honorable S. T. Rayborn
The Honorable Paul M. Moore

[3] THE COURT:
The Court calls WC-73-65-K, Billy D. Cook and others vs. Roger Hudson and others, for a hearing on additional evidence.

The Court has notified the parties that the case is reopened for the submission of additional evidence on the part of either side.

My reason for doing that was the Defendants requested the submission of additional evidence. Looking back in this case, it came to trial rather quickly, especially for final hearing. So I believe the ends of justice would be served by allowing that. You are not to go over the same ground, but offer additional evidence that you may see fit.

Do the Plaintiffs desire to offer additional evidence?

MR. FARESE:
Your Honor, as I understood it, we had rested our case.

THE COURT:
Yes, sir. I am giving you an opportunity to offer additional proof, if you desire.

MR. FARESE:
Well, I would put it on in rebuttal, but I don't know what —

THE COURT:
[4] Well, let's see what comes up, then.

MR. FARESE:
Yes, sir.

THE COURT:
What say the Defendants?

MR. HICKMAN:
Call Mr. Mallory.

R. W. MALLORY,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HICKMAN:
Q Would you state your name for the record.
A R. W. Mallory.
Q Mr. Mallory, I believe you previously testified in this proceeding.
A Yes, sir.
Q You are presently the Calhoun City —
A County —
Q With the Calhoun County School Board.
Mr. Mallory, you have testified that there was a policy adopted around November, 1972, in which you indicated that teachers that taught in the public schools of Calhoun County, that their child should attend the public schools. [5] Now, I want you to tell the

Court in your own words your background and what prompted you to make a decision to adopt this policy as a member of the Board, as the president of the Board.

MR. FARESE:
Now, may it please the Court, at this time I am going to object to this evidence. I understood that this hearing was solely for one purpose and that was to determine whether or not the Calhoun County Academy was an all-white school or not. And that that is what this hearing was limited to, Your Honor.

THE COURT:
No, sir; I believe the order re-opened it for all issues for both sides.

MR. HICKMAN:
All right, sir.

THE WITNESS:
Well, this is — now, this is — run that back by me, that question.

BY MR. HICKMAN:
Q Well, I want you to just —
A My basis for forming this policy?
Q That's right. In your own words, tell the Court your basis for you as a member of the board —
A Well, this is like we had already brought out, [6] that we didn't think that a teacher that had kids we'll say in this Calhoun County, maybe that's because

that's where they work, would be dedicated to the public school system. There's —

Q Well, now, do you have any knowledge as to the status of the academy, any personal knowledge?

A Yes, sir.

Q If so, tell the Court.

A I have been — I have picked kids up there, you know, my brother has a kid that goes to school here. I have picked him up from time to time.

Q Do you live near yo[illegible] brother?

A Yes, sir.

Q And do you know why he sent his children there?

A He said to keep from sending them —

MR. FARESE:

Now, Your Honor, we will object to what he said.

THE WITNESS:

I'm just saying what he said.

MR. HICKMAN:

Q Well, now, you got complaints, didn't you —

MR. FARESE:

Now, Your Honor, we will object to the leading question. He is trying to put words in this witness's mouth.

THE WITNESS:

[7] Well, now, this is our thoughts behind forming the policy.

THE COURT:

What is the background of the policy?

THE WITNESS:

These people that have kids in the private schools, especially at the time of the organization, were hard prejudiced against the public schools. Now, that was evident, you know, anywhere. Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought. That's our thinking on it.

MR. HICKMAN:

Q Well, now, were complaints made to you? If so, by whom?

A I know nothing you could probably pin down, but, you know, you just hear talk concerning this. It's nothing unusual for somebody else, "You going to send your kids to school up there with them niggers?" Something like this. You know they are prejudiced.

MR. FARESE:

Now, may it please the Court, I am going to object to this type of testimony unless he tells us who said it, when it was said, and what they said.

MR. HICKMAN:

[8] All right.

Q What did your brother say?

MR. FARESE:

Your Honor, I am going to object to what his brother said.

THE WITNESS:

Let me say this —

THE COURT:

I think I will hear some of this hearsay. Let's see just what he is going on there.

THE WITNESS:

That's the only way we have of knowing what decision to arrive at as a board. If you don't know what the people think, you don't know, you know, how their policy is going to work or something. If whatever policies you make doesn't pretty well go along with the minds of the people, it's not going to be — you're going to have trouble with it, you know. Just like a law. If it's not in the minds of the people, it's going to be hard to say.

MR. HICKMAN:

Q What did your brother say? Your brother said —

A He said he didn't want his —

MR. FARESE:

Your Honor, for the purposes of the record —

THE WITNESS:

[9] — kids going to school with them niggers.

MR. FARESE:

May the record show my objection?

THE COURT:

Yes. Overruled.

MR. HICKMAN:

Q Did other people talk to you along that line?

A Yes, sir.

Q More than one?

A Yes, sir.

Q Was there anything said to you about the court order?

A Yeah, a lot said to me about —

Q Just tell the Court.

A "You just tell that court to go — somewhere."

Q What about these people — were they living in your area?

A Yes, sir, the people that I see and associate, yeah.

Q Are you associated with them regularly, frequently?

A Yes, sir.

Q Was this frequent complaints made to you?

A Not as much, you know, in the last two or three years. I think a whole lot of it has gone from what, you know, it originally was. But it's hard to believe, now, for [10] me personally to believe that all of the prejudice that these people have is gone, you know, completely enough that they could dedicate theirselves to the public school system.

Q Well, did you ever have occasion to go to the private school?

A Yes, sir.

Q On how many occasions?

A Oh, three, four, five maybe.

Q Now, this was all prior to the adoption of this policy?

A Yes, sir.

Q All right.

When you got to the school, what time of the day was it?

A It was at the end of the school day, to pick kids up.

Q All right. And you picked up some kids?

A Yes, sir.

Q All right.

Did you observe the students there at that school?

A Yes, sir.

Q All right. Were they white or black?

A White.

Q Did you see any staff, faculty at that school?

[11] A Yes, sir.

Q Was it white or black?

A White.

Q Now, how many locations has this school had since it was organized? This private school in Calhoun County.

A It has had twc. The first year it was in a little building.

Q All right.

The first year, did you have occasion to go to the school at that time?

A Yes, sir.

Q And the students that you say, what color were they?

A White.

Q And what about the faculty?

A White.

THE COURT:

Excuse me. What type of building was that? You say "a little building."

THE WITNESS:

The first building was an old house — not — I'd say an old house. It was a house that had been rented out. They just rented several rooms in it.

THE COURT:

Where was it located, sir?

[12] THE WITNESS:

South of Calhoun City.

THE COURT:

About how far south?

THE WITNESS:

Six miles, I'd say.

THE COURT:

All right.

Who were the staff the first year? Do you know some of them?

THE WITNESS:

I knew some of the teachers.

THE COURT:

Yes, that is what I mean.

THE WITNESS:

I believe Carol Barnett — she is Carol Easley now — taught the first year. Maybe Edna Denton. She's an Easley, too, now.

THE COURT:
Were they formerly public school teachers?

THE WITNESS:
No, sir, they was just out of college.

THE COURT:
I see.

THE WITNESS:
[13] Both of them lived in my community, neighbors.

THE COURT:
I see.

THE WITNESS:
And I don't know who —

THE COURT:
Now, who was the headmaster? Did they have one the first year?

THE WITNESS:
I believe they called it maybe head teacher. I'm not sure who she was.

THE COURT:
All right.

MR. HICKMAN:
Q Now, do you know who formerly owned this house?

A The Fondergberg (phonetically) brothers, Russell and Irving, the Plymouth dealers at Calhoun City, owned the buildings then. And still do.

Q Who owned it?

A Fondergberg's. Russell and Irving Fondergberg.

Q Now, at what point of time was this facility which you described to the Court placed in existence with reference to this Court's order?

A You mean the school?

Q Yes. At what point of time was this facility, [14] the private school, established with reference to this Court's order to desegregate the Calhoun City School System?

A That same year, the fall of '68.

THE COURT:
Do you know what its initial enrollment was, approximately?

THE WITNESS:
No, sir. It was — the first year, it was pretty small, I think, how, I'm not sure.

THE COURT:
All right.

THE WITNESS:
Maybe they only had four or five or six grades.

THE COURT:
I see.

THE WITNESS:

And they added grades on, I think, later. I'm not positive about that.

MR. HICKMAN:

Q And this was just an old home?

A Yes, sir. They had moved it out of town. Maybe somebody lived in it before, I don't know. But it was vacant at the time when they rented it for that purpose.

Q Do you know how it was heated?

A No, sir, I don't. Probably, I guess, propane, [15] gas heat.

Q Do you know anything about the size of the grounds for the facility?

A Yes, sir. They had probably two or three acres around it, you know.

Q All right.

Now, was that located on the blacktop road?

A No, sir, it was on a little gravel road just off the blacktop, maybe a couple hundred yards.

Q On the gravel road —

A Between Pleasant Hill Church and the highway.

Q Was that road just a private road up to this house?

A No, sir: it was a public — it was a county road.

Q It was a county road. All right.

Do you recall approximately how long the school stayed at that location?

A One year, I believe.

Q All right. And then what happened?

A Then they built this building where they are now.

Q And where is that located?

A That's north of Calhoun City about four or five miles, I imagine. It's on —

Q And with reference to the location of this [16] facility, where do you live?

A I live closer to the first one. I live about four or five miles south or west of this first building and thirteen or fourteen miles from the new building.

Q Do you have occasion to pass the present facility?

A Yes, sir, occasionally. It's between Pittsburgh and Calhoun City.

Q Do you pass it weekly, or daily, or —

A Just now and then. Didn't — twice a week, may be two or three weeks before I pass there.

Q On occasion when you pass there, do you see the students out playing?

A Yes, sir.

Q Do you observe them?

A Yes, sir.

Q Are they white or black?

A They are white.

Q During any of your visits to this facility, this private school, have you ever seen a black?

A No, sir.

Q Isn't it a fact, Mr. Mallory, that the common knowledge in Calhoun County is that it's an all-white school?

MR. FARESE:

Now, Your Honor —

[17] THE WITNESS:
It's common knowledge.

THE COURT:
Just a moment.

MR. FARESE:
— I object to leading. He is putting words in the mouth of the witness.

THE COURT:
How is this school regarded generally?

THE WITNESS:
It's regarded as a segregated school.

THE COURT:
By the public of Calhoun City and Calhoun County?

THE WITNESS:
It is common knowledge that it is. I don't think anybody would deny that.

THE COURT:
Do you know what textbooks it is using?

THE WITNESS:
No, I don't.

THE COURT:
All right.

THE WITNESS:
I have seen the books, but, you know, I didn't [18] pay a lot of attention to them.

THE COURT:
All right.
Go ahead, Mr. Hickman.

MR. HICKMAN:
Q Now, I don't want to be repetitious. I believe at the last hearing you testified as to the further reason for adopting this policy as to the complete cooperation, working together of all the teachers. I'm not leading in that respect, but I believe you covered that at the last trial, at the last hearing.
A Yes, sir.
Q Now, is that part of your reason for adopting this?
A Yes, sir. There has got to be just a little friction, you might say, or animosity between some of these people, you know, that teach at these — that have kids in the private school and public schools, in my opinion.
Q Was that expressed to you in your community by people?
A Yes, sir. Now, this — now, we discussed this policy for maybe two or three years before we ever done anything about it.

THE COURT:
All right.
[19] Now, as of November, 1972, was the Calhoun Academy growing in attendance?

THE WITNESS:
I really don't know. I think maybe the first two or three years they added a grade or two. Now, I'm not positive about that. But I think it did make a growth the first couple or three years. But —

MR. HICKMAN:
Q Did you get complaints from teachers?
A Well, yes, sir. You know, every once in a while somebody mentioned it. Somebody had something to say about us teachers with kids in private school. So we knew sooner or later something was going to have to come up on it.

THE COURT:
Well, now, when you adopted the board policy in November, 1972, what type of publication of this policy was given to the school teachers?

THE WITNESS:
Not any, I don't think.

THE COURT:
You mean you did not tell the teachers?

THE WITNESS:
Oh, yes, sir. Word of mouth is all, I mean, the teachers, of course, Roger was at the meeting and was told, Mr. Hudson. And he, of course, told the teachers. But as far [20] as I know, there wasn't any published notice.

THE COURT:
But are you telling me, though, that —

THE WITNESS:
The teachers got the word.

THE COURT:
— the teachers got the word? They got the word when?

THE WITNESS:
They got it, I'd say within the next day or two.

THE COURT:
After the policy was adopted?

THE WITNESS:
Yes, sir.

THE COURT:
Are you reasonably sure they were put on notice?

THE WITNESS:
Yes, sir.

THE COURT:
Right away?

THE WITNESS:
Yes, sir.

MR. HICKMAN:

Q Now, that policy you adopted did not apply, of course, for that current year?

[21] A No.

Q That was just for the year beginning in '73, was it not?

A Yes, sir. Because the contracts had already been made with teachers at that time. School was in session.

Q And it didn't involve a matter of a discharge?

A No, sir.

Q It was a matter concerning the recommendations for future employment?

A Yes, sir.

Q Now, Mr. Mallory, when you adopted this policy, what facility did you have in mind principally?

A Well, this was Calhoun — of course, Calhoun Academy was the only facility in the county other than public school.

THE COURT:

Did your policy expressly apply only to Calhoun Academy?

THE WITNESS:

No, sir. I mean, it didn't say so in the policy. But, of course —

THE COURT:

What was the intent?

THE WITNESS:

Well, that was the intent, because that was the [22] only school involved, you know.

THE COURT:

That was the only private school in the county?

THE WITNESS:

Yes, sir, only other school.

THE COURT:

And you never had a private school in the county before it started?

THE WITNESS:

No, sir.

MR. HICKMAN:

Q Didn't have any religious or parochial schools in Calhoun County, did you?

A No, sir, not as far back as I can remember.

Q And with reference to a child that was deaf or dumb or attended, say, a school of —

A Well, that would be totally different. I mean, as far as we were concerned. Because the biggest concern we had was, of course, like we said, that these — if the teacher has got a kid in one school they are bound to have, you know, some loyalty to that school. And we just — it was our opinion that they wouldn't be as fully dedicated to the school system. That was our basis for forming the policy.

Q And, too, I believe you testified that it was a segregated school.

[23] A Yes. I don't think there's any question about it. There wasn't in our minds at the time, I know.

THE COURT:

Well, now, did any teacher apply to the Board for an opportunity to give reasons as to why the policy should not apply to him or her?

THE WITNESS:

Not to my knowledge, no, sir.

MR. HICKMAN:

Q As president of the board, if it had been, you would have been advised, would you not?

A I should have been. As long as I have been on the board, I don't ever remember anybody being denied a hearing. We have had people before the board on lots of different things, you know.

Q But there wasn't any request on the part of any of the plaintiffs in this case for a hearing, was there, so far as you know?

A No, sir, as far as I know, there wasn't anything said to me about it.

Q Mr. Mallory, I might ask you this. Did you also get complaints from the children in the attendance center?

A There was some, yes, sir.

MR. FARESE:

Now, Your Honor, I am going to object —

[24] THE COURT:

It is leading.

MR. HICKMAN:

Q Then, if you will, just so the Court will have full information, just give the groups that made complaints prior to this policy being adopted.

A Well, you would hear a parent say the kid wanted to know why so-and-so was her teacher and her kid was in a private school, you know. Hear reports of that all along.

Q Was that frequent or infrequent?

A It was fairly frequent. The kids couldn't understand it.

Q Well, was that part taken into consideration when you adopted your policy?

A Yes, sir.

THE COURT:

Now, before the policy was adopted, how many teachers did you have who sent their children to the Calhoun Academy?

THE WITNESS:

Eight, I believe.

THE COURT:

Eight?

THE WITNESS:

[25] In Calhoun City schools.

THE COURT:

All right. Out of how many teachers?

THE WITNESS:
I'm not sure. I just don't want to say.

THE COURT:
All right, sir. But before the policy was adopted you say you had eight teachers sending their children to Calhoun Academy?

THE WITNESS:
Yes, sir.

THE COURT:
All right.

MR. HICKMAN:
Q Mr. Mallory, was it any groups rather than just individuals that, through newspapers or otherwise, influenced you in any way in making this decision?
A Nothing that would — outside of the school. Of course, the groups that — the people that contributed and supported the school.
Q What groups contributed?
A Citizens Council, for one.
Q What were they contributing to? The support of which school?
A Calhoun Academy.
[26] Q You have had that information?
A Yes, sir.
Q Did you also consider that when your policy was adopted?
A Yes, sir. It was in the paper all along, you know, pieces of them. In the local newspaper.

THE COURT:
What do you mean? What was in the paper?

THE WITNESS:
The pictures of the Council contributing money to the school.

THE COURT:
I see.

THE CLERK:
Defendant's Exhibit Number One for identification.

MR. HICKMAN:
Q Mr. Mallory, I ask you to take these one at a time now and pick up the first one and identify the name of the paper at the front.
A Monitor Herald.
Q Beg your pardon?
A Monitor Herald.
Q All right.
What is the date of that paper?
A September 13, 1973.
[27] Q All right.
What appears on the front page of that paper?
A Well, that's the Calhoun City's governing board there. Let's see what else we have got in here. I don't see anything concerning it on that one.
Q Turn inside, Mr. Mallory.
A Yeah, there's a check for two hundred dollars going to Calhoun County as proceeds from the Country Music Show Saturday night sponsored by Calhoun

City's Citizens Council. B. R. Steel, Earl Wayne Armstrong and Forrest Low.

Q Does it show who is making presentation?

A No, sir. But this was a country music show, as I — I believe that's what it was.

Q All right.

A But the proceeds went to that. It was sponsored by the Citizens Council.

Q All right.

Now, take the next picture, if you will, and identify it.

A This is the Monitor Herald, August 31, 1972.

Q Now, that, of course, was prior to the time you adopted your policy?

A Yes, sir. There's another check for seven hundred dollars. Ellis Denton of Sabogley Community, Vice President of Calhoun County Citizens Council, presents a check for [28] seven hundred dollars to Rex Jarrod of Bruce, member of Calhoun Academy Board of Trustees. The check is for the amount of the proceeds taken at the barbecue supper sponsored by the Council Saturday night.

Q All right.

If you will, look at your next page, please, sir.

A This is the Monitor Herald, April 13, 1972.

Q That, of course, was prior to your policy?

A Yes, sir. This is a picture of Elmer Steel presenting Fred White a check for five hundred dollars, presented to Calhoun Academy by Calhoun County Citizens Council from proceeds of a fish fry Friday night, presented by E. L. Steel, president of the county council, to Billy White, vice president of Calhoun County Academy Board of Trustees.

Q All right.

Look at the next one, please.

A This is the Monitor Herald, May 3, 1973. This is Lonnie Pryor III of Flake Springs, member of the Board of Directors of Calhoun County Citizens Council, presenting a check to Rex Jarrod of Bruce, a trustee for Calhoun Academy, from proceeds of the barbecue supper held here Saturday night. It don't give the amount, I don't believe.

Q All right, sir.

Now, take the next one. Identify it.

A Monitor Herald, November 30, 1972.

[29] Q What date?

A November 30th.

THE COURT:

Do you want to come over and sit in the jury box?

MR. FARESE:

Yes, sir.

THE WITNESS:

I'm sorry, I haven't got a good carrying voice.

MR. HICKMAN:

Q Now, what date?

A November 30, 1972.

Q Now, let me ask you this, Mr. Mallory. All these papers that you have identified, where are they published?

A Calhoun City.

Q Mississippi?

A Yes, sir.

Q All right. Is this where the private academy is located?

A Well, it's you know, out of town three or four miles.

Q All right.

Now, what is the picture on that front page of that paper?

A This shows Don Reedy of Vardaman, member of the [30] Board of Directors of Calhoun Citizens Council, presents a check for four hundred four dollars nineteen cents to Max Jenkins of Bruce, member of the academy school board.

Q All right.

A Proceeds of a barbecue supper held recently.

THE COURT:

Is that the only newspaper published in Calhoun County?

THE WITNESS:

No, sir. Bruce has one. Journal.

THE COURT:

All right. What is the circulation of the Monitor Herald?

THE WITNESS:

I don't really know. It may tell you here.

MR. HICKMAN:

Q Is it circulated all over Calhoun County?

A Oh, yes, sir, all over. A lot of other places. People that live — have moved from here to somewhere else, you know, they keep the county paper and keep up with what is going on.

MR. HICKMAN:

I offer in evidence the issues of —

THE COURT:

All right. Let Mr. Farese examine them at this [31] point.

MR. HICKMAN:

All right.

MR. FARESE:

Your Honor, I don't care to examine them. For the purpose of the record, I would object to these as being immaterial and irrelevant to the issue at hand.

THE COURT:

Overruled. Let the papers be received as collective exhibits.

MR. HICKMAN:

I believe that's all.

THE COURT:

You may cross-examine.

CROSS-EXAMINATION

BY MR. FARESE:

Q Mr. Mallory, you testified previously in Aberdeen in this case, didn't you?

A Yes, sir.

Q And since that last court hearing, you have had quite a few consultations with your lawyer, haven't you?

A I wouldn't say quite a few.

Q Well, let's put it this way. You have consulted with him, haven't you?

[32] A Yes, sir.

Q And he told you that the principal problem he wanted you to testify to was that you had a reason for adopting this policy. That's true, isn't it?

A Yes, sir.

Q And you didn't say this in Aberdeen, did you?

A We wouldn't adopt a policy without a reason.

Q I didn't ask you that, Mr. Mallory. You didn't say that in Aberdeen, did you, sir?

A I don't know. I don't know whether I was asked.

Q Well, I'm saying you didn't say that, did you?

A I don't remember about it.

Q Yes, sir. And in Aberdeen you said that the reason that you adopted that policy was that if a teacher taught in Calhoun County public schools that that teacher should send his or her children to the public schools of Calhoun County. You said that, didn't you?

A Yes, sir, that's the policy.

Q Yes, sir. And you also said it didn't make any difference whether they were going to a parochial school, a private school, that this said that if they taught there

they would have to send their children there. You said that, didn't you?

A I don't think so.

Q You don't think so?

[33] A No, sir.

Q Are you going to say under oath that you didn't say that, Mr. Mallory?

A I don't — now, here's what I remember about it. That I said that this hadn't come up. We didn't have any of those kind of schools.

Q All right.

A But that's what the policy — that's the way the policy is — was stated, that if they taught in the public schools they had to be in them.

Q Yes, sir. And the policy said, in effect, that if a teacher taught in the public school system of Calhoun County that teacher had to send his or her children to the public schools of Calhoun County. That was your policy, wasn't it?

A Yes, sir.

Q Now, Mr. Mallory, what is wrong with the Citizens Council, the KKK, the NAACP or anybody else in America giving a donation to anyone? Is that wrong?

A No, sir. Not a thing wrong with it.

Q Did you think it was wrong for the Citizens Council to contribute the proceeds of a fish fry to this private academy?

A No, sir.

Q Did you lend any significance to this in your [34] mind?

A (No oral response)

Q Was it wrong?
A No, sir.
Q You had no objection, did you?
A No, sir.
Q In fact, many of those people are your friends and neighbors. That's true?
A Yes, sir.
Q And you feel that they have the right to think as they wish in this democratic country, don't you?
A Yes, sir.
Q Now, do you think it's wrong for people, for whatever reason they see fit, to establish a private school?
A No, sir.
Q You think that in America they have that Constitutional right?
A Yes, sir. I'm all for it.
Q Please, sir?
A I'm all for it. If that's what they want, it's fine.
Q All right. Then why, if you are all for it, do you adopt a policy that says, "If you want to teach in this public school you have got to send your children there rather than to a private school"?
[35] A You — if a teacher is going to teach in our school, if they are going to have their full interest in teaching, their kids are going to be there, too. That's our opinion. That's what we based this on.
Q All right.
Let's talk about the plaintiffs. Did you ever get a single complaint against any one of them?
A About anything or just —
Q No, sir, about —
A — something particular?

Q No, sir. About the fact that because their children were in a private school that it affected their proficiency.
A Not specifically their teaching, no.
Q In other words, the only reason that you tell this Court that they are not teaching in the public school system is that they have their children in that private school. That's true, isn't it?
A Yes, sir.
Q All right. And there is nothing against their teaching ability, because they have taught for many years. That's true, isn't it?
A In their ability, no, sir, I don't think there would be anything.
Q All right. So we have established that without [36] question.
Now, Mr. Mallory, you know, I always like to know who said what. I don't like to know what "somebody" said. You know about everybody in your district in Calhoun County, as we all do in small counties. That's true, isn't it?
A Yes, sir.
Q Now, will you tell the Court some names of people who complained to you about this condition?
A Oh, I don't know. You hear — well, people mention these things to you that — it comes maybe through somebody else or they want to know why this, that and the other, but —
Q Yes, sir. Mr. Mallory, I don't want to know about "somebody," sir. You know the people, don't you?
A Yes, sir.
Q And if they complain to you and they are reputable people, you will listen to them, won't you?

A Yes, sir.

Q Now, tell this Court, if you will, who, by name, complained to you about this situation.

A You mean about the teachers having kids in a private school?

Q Yes, sir.

A Oh, I don't know.

[37] Q You don't know?

A By name.

Q All right.

Give me the names of any children who complained to you that they didn't like, or that it hurt them, to think that these teachers had children in private school. Give me their names.

A These — of course, these children didn't mention this to me, they mentioned it to the parents and the parents —

Q Oh. So you got it by hearsay?

A Yes, sir.

Q All right. Give me the names of the parents, then.

A Oh, two or three of the kids around there, like the Simpson kids or Betty Simpson's kids.

Q Now, you believe or you are sure?

A I'm sure.

Q Simpson kids?

A Yes, sir.

Q You mean the Simpson children, don't you?

A Yes, sir. Three of them, girls.

Q What did they say?

A They just asked their mother why so-and-so — why that teacher had —

[38] Q Did they tell you that?

A That's what the parents said.

Q Oh, the parents told you. But you don't know that of your own personal knowledge, other than what —

A No, sir.

Q — the parents are supposed to —

A No, sir.

Q Those are the only ones you can remember?

A Well, there's more than that.

Q Well, name them.

A Not specifically, no, sir.

Q So that I have asked you to name me the people and you couldn't remember any, and you named me one family that you say the children are supposed to have told the parents.

Now, you said that when the court order came out that people were disturbed.

A Yes, sir.

Q Were they disturbed, would you say, because they felt that they ought to have a freedom of choice of sending their children to whatever school they wished? Would you say that?

A That was —

MR. HICKMAN:

We object to that. The court order speaks for [39] itself.

THE COURT:

Well, he is on cross examination. Overruled.

MR. FARESE:

And he opened the door to this.

THE WITNESS:

That was, of course, some of it, you know.

MR. FARESE:

Q Do you believe in that policy, that a parent ought to have the Constitutional right to send their child to the school of their choice?

A Yes, sir.

Q And you don't have any objection to anyone in Calhoun County who, for whatever reason, wants to send their children —

A No, sir.

Q Then why do you put a restriction on these teachers earning a livelihood and say, "If you don't send your children to public schools then you can't teach there"?

A Because it's our opinion that they are not going to be as dedicated as a teacher should be.

Q Do you have any reason to believe that?

A At the time this court order came out, there was lots of hard talking against the school board and against the public school system.

[40] Q And that went on all over Mississippi.

A It went on all over Mississippi, I'm sure.

Q Yes, sir.

A But these — the people that — we'll say the people that are sending their kids to this Calhoun Academy were pretty well of one mind on the thing. You know what I mean. They thought, "We just as well forget the public school system."

Q They thought what?

A "You just as well scrap the public school

system." That was kind of, you know, the general thought or the general thinking.

Q All right.

You know all of these plaintiffs. Did you ever hear any one of them say one derogatory word?

A No, sir.

Q No, sir.

A But I'm not that close to those people. I don't associate with them every day.

Q I didn't ask you that. As president of the county school board, did you ever hear these plaintiffs say one derogatory word against the public school system?

A No, sir.

Q Now, when did this board adopt this policy?

A In November of '72.

[41] Q You were in court in Aberdeen, weren't you?

A Yes, sir.

Q You heard Roger get up and testify that he talked to the teachers in July of '72, didn't you?

A Yes, sir.

Q Did he have authority at that time to tell the teachers that they were not to be employed unless they sent their children to public school?

A Well, now, my thinking on the thing is that the school board hired Roger to run that school.

Q I didn't ask you that question.

A In my opinion, he had the authority because he was —

Q So, now, you are telling the Court that he had the authority, and not the school board?

A Well, it's — the teachers are hired on his recommendations.

Q Then if he had the authority, what was the need of the school board adopting a policy to that effect? Why couldn't you have just told him, "Roger, don't hire anyone unless they agree to send their children to private —"

A The school board was merely backing him up in his decision. Of course, we — as far as the thinking on this line, it had been in the school board's mind for, like I said, two or three years.

[42] Q All right. So you were going to back him up, right, Mr. Mallory?

A Yes, sir.

Q And if he saw fit not to hire him for that reason, the school board would automatically back him up, right?

A Yes, sir.

Q Then what was the necessity of any hearing? What good would a hearing have done?

A It may not have done any. It would just depend on what come out in the hearing.

Q Yes, sir. But your policy was, regardless, if they sent them to the private school they wouldn't be hired.

A Yes, sir.

Q It was a blanket policy.

A Yes, sir.

Q Now, do you think that it's right for you school board to deny these children or any teacher if they want to send them to Calhoun Academy because they can get some religious training, do you think that's wrong?

MR. HICKMAN:

Your Honor, we object to the form of the question.

THE WITNESS:

This is not a religious school.

THE COURT:

[43] I think he has answered.

THE WITNESS:

I mean, there may be some religion in it, but it's not basically a religious school.

MR. FARESE:

Q Well, I didn't ask you that.

You do know they teach religion there, don't you?

A No, sir, I don't know that.

Q Oh, you don't know that?

A No, sir.

Q Didn't you hear them testify from the stand that they had Bible reading and Bible stories for their children?

A They don't —

Q You heard them say that, didn't you?

A Do they have a regular class in Bible?

Q You heard the testimony, didn't you?

A Yes, I heard a lot of testimony. I don't remember all the testimony.

Q Oh, you don't remember.

Now, let's assume that this teacher wanted to send her child there so that the child could get some religious training. What would your board policy be then?

A It would be hard for me personally to believe [44] that that would be the reason for them sending them there.

Q I didn't ask you about that, Mr. Mallory. I just asked you if this teacher came before your board and said, "I want my child to go to that private academy because I want my child to get some religious training," what would your attitude be then?

A I wouldn't believe it.

Q Oh, you wouldn't believe it?

A Not as a reason for sending them, no. Personally.

Q Now, you know two colored teachers, the Enochs, don't you?

A Aubrey Enoch?

Q Yes, sir.

A I know Aubrey, yes, sir.

Q And you knew that their children were going to a private school in Atlanta, didn't you?

A No, sir, I didn't.

Q Oh, you didn't?

A No, sir. I mean, I know it now. I know they went to school in Atlanta, I didn't know where.

Q And you knew it at the last hearing, didn't you?

A I heard it then, yes, sir.

Q Yes, sir. And they were told that they would not get their job and when they started fussing they immediately [45] got their jobs back, didn't they?

A Now, as I understand this thing, their kid had finished maybe school by then. But the kid was living with somebody over there. It had nothing to do with the school, it's just — that's where she was living.

Q They were still teaching in the Calhoun County system, weren't they?

A Yes, sir.

Q And they were living there, weren't they?

A Yes, sir.

Q And so why do you have a double standard?

A Well, I — as I understand it, the kid was out of school by this time anyway.

Q Oh, that was your understanding?

A Yes, sir.

Q I see.

How about the Hamblin children? Mr. Hamblin taught school there, didn't he?

A Yes, sir.

Q And his children went to a private school and are still going to a private school, aren't they?

A As far as I know. Now, I don't know.

Q Yes, sir. And he was re-hired, wasn't he?

A Yes, sir. But I don't think — I know I didn't know about it at the time. And presumably they didn't.

[46] Q But your principal knew about it, didn't he?

A I don't think he did at the time the contract was made. See, that was last March, I think, isn't it?

Q Yes. But the policy was in effect in March, wasn't it?

A Yes, sir.

Q And are you telling me that your principal didn't tell these teachers that prior to re-employment he wanted to know if their children were going to public school?

A At this time, I think he thought the kids were in the public school system.

Q He thought they were in the public school system?

A Yes, sir.

Q When you know they were not?

A I don't — I didn't — I don't know that they are not. But, now, these kids have a — as I understand it, they

have a problem different from any of the others involved. Of course, I can't — I say I can't see an advantage to Calhoun Academy over the public school.

Q That's right. Because you heard the testimony on this stand that they had special training in the public school that they didn't have in the private school.

A Yes.

Q Yet, those children go there and no action was [47] taken there, was it?

A May not have been, because it wasn't known.

Q Now, you know Mr. John Burt, don't you?

A Yes, sir.

Q What position does he occupy with the Calhoun County Public School System?

A He is Superintendent of Education.

Q And he is one of the ones that adopted this policy, right?

A He don't have anything to do with adopting policies, other than maybe recommending the policy.

Q You all work together, now, don't you?

A (Moving head up and down)

Q He knew about the policy. You heard him testify.

A Yes, sir.

Q Now, do you have a headstart program in Calhoun County?

A I don't know. I really don't know.

Q You don't know?

A No, sir.

Q Well, if I told you you did, you wouldn't dispute it?

A I wouldn't argue with you, no, sir.

Q And that this headstart program is open to children of all races?

[48] A Yes, sir.

Q And you know that you also have a private white kindergarten school there, don't you? You know that, don't you?

A The only kindergarten — that's the only kindergarten — we don't have a kindergarten in the public schools.

Q You have a headstart program. That's public, isn't it?

A I guess so, yes, sir.

Q And you know Mr. John Burt's child goes to that segregated white kindergarten school. You know that, don't you?

A No, sir.

Q Oh, you did not know that?

A You just told me so. First knowledge.

Q I see.

So, Mr. Mallory, to condense your testimony, we will agree, won't we, that the only reason that these teachers were not employed was that their children were going to that private school and if they had withdrawn them they would have been re-employed?

A Yes, sir. As far as I know, they would have.

Q Yes, sir. Well, you heard the testimony from everyone, didn't you?

[49] A Yes, sir.

Q And you heard the agreement that that was the only reason that they were —

A Yes, sir.

Q Now, this policy that you adopted does not apply to single teachers, does it, because they are presumed not to have children?

A No, sir.

Q It applies only to married people?
A If a single person has a child, it applies to her.
Q It would apply?
A I mean, I can't see why it wouldn't.
Q Can you tell this Court whether anyone in that private school has ever done anything to your public schools to hurt them in any way?

MR. HICKMAN:
Your Honor, we object. We don't think that's material or relevant, as to what they have done to hurt them.

THE COURT:
Well, it is cross. I will let him ask it.

THE WITNESS:
I don't know whether they have ever done anything other than just talk.

MR. FARESE:
[50] Q Just talk.
A But talk —
Q Is there anything wrong in American people expressing their views?
A Well, public opinion, you know, some people have a lot of influence, some people influence other people in their thinking. And just talking something over the counter can have a whole lot of effect on the way the general public looks at schools.
Q Do you know what the First Amendment to the Constitution is, Mr. Mallory?
A In general.

Q Do you know that it says that people shall have the right to freedom of association, freedom of speech? You don't want to deny anyone that right, do you?
A No, sir.
Q Now, you said that this private school was an all-white school. Do you know whether any Negro or member of any other race has ever made an application to that school?
A No, sir.
Q And you won't tell this court under oath that a black person, a red, yellow, green — if they came from Mars or anywhere else, who made an application would be refused because of their race, would you?
A Mr. Cook testified to that.
[51] Q I'm asking you, do you know?
A Other than his knowledge, he was the headmaster and he testified to that.
Q All right.
Do you know who approves the applications in the private school?
A The Board of Directors, as I understand it.
Q And they are the ones that decide who will come in; not Mr. Cook. That's true, isn't it?
A I imagine. I would say so.
Q You know that's true, don't you, Mr. Mallory?
A I haven't — as far as knowing, now, that's just like me knowing that they would — whether or not they would admit it. I know in my own mind they wouldn't. But as far as hearing them say so, other than Mr. Cook, I haven't.
Q Now, you can't testify under oath that if a black made application that he would be denied, can you? Under your oath.

A Not as far as except in my own mind, my own thinking.

Q I am talking about whether you have any concrete legal basis to determine that from the admission policy.

A No, sir.

Q All right.

Do you know of any teacher who has applied to [52] teach at the private school who is a member — let me get through with my question, please.

A All right, sir.

Q — who is a member of a race other than the white or Caucasian race who has applied and been refused employment?

A No, sir.

Q And you don't know whether they would or wouldn't, do you?

A No, sir, as far as being —

Q All right.

A — black and white and so on.

Q Have you ever read the by-laws of the Calhoun Education Foundation Corporation?

A Nothing more than just glance at them.

Q Have you seen anything in those by-laws that has any reference to race, creed, color, or national origin?

A No, sir.

Q Now, you said that these teachers didn't ask for a hearing. Did you offer to give them a hearing?

A No, I don't imagine so. No, sir, I didn't.

Q And to be honest and truthful with this Court, the reason is that the policy had been adopted and if they wanted to teach they would pull their children out and

put them in public school; if they didn't want to teach, then they [53] would leave them in private school?

A They could do like Mr. Cook, go teach at private school.

Q You heard my question. Was I right about it?

A Yes.

Q Now, you tell this Court that one of the reasons was that you wanted to do what the court told you to do and that you had this great feeling of abiding by the court's order. Have you checked into your bus routes?

A Yes, sir.

Q Will you tell the Court under oath, isn't it a matter of fact that there are a couple of these buses that are totally segregated, all-black buses, and that they go down roads where white children live? That's true, isn't it?

THE COURT:

Mr. Farese, I do not believe that is material at all to this case. Let's try to confine it to what this case is about.

THE WITNESS:

The one that comes by my house is integrated, I'll tell you that.

MR. FARESE:

That's all right, Mr. Mallory, you don't have to answer that.

THE COURT:

[54] Let's not go into school buses. That is a second set of headaches.

MR. FARESE:
Yes, sir. But I just want to show this great feeling that they have.

THE COURT:
I understand your point.

MR. FARESE:
Q Now, Mr. Mallory, you heard Mrs. Adams testify in Aberdeen that she had taken her child to a psychiatrist and to doctors and that the doctors thought that the child should be placed in a climate where there would be no friction of any kind and that it would be to the best interest of that child. You heard that?
A Yes, sir.
Q Do you have any reason to dispute that sworn testimony?
A No, sir.
Q Then why didn't you let her teach in the public schools of Calhoun County under those circumstances?
A These circumstances at this time wasn't presented to us. I mean, it wasn't to me, anyway.
Q But you said it would make no difference.
A I didn't say that it wouldn't make any difference, now.
[55] Q All right. Now that you know what her circumstances are, would you, as president of the Calhoun County School Board, reconsider your decision as to her case?
A Possibly —

MR. HICKMAN:
Your Honor, we object to that question.

MR. FARESE:
Now, Your Honor, I want to hear his answer to that.

THE COURT:
Well, let's hear it.

MR. FARESE:
I think it is pertinent.

THE WITNESS:
It would depend on, you know, what — of course, any decision you make is subject to reconsideration. You don't make a decision that is just absolute. Or very seldom you would.

MR. FARESE:
All right.
Q Then why weren't these teachers notified, "If you have any personal reason or any legitimate reason, then you appear before this board and tell us; otherwise, we will not employ you unless you send your children to the public school"? Why didn't you do that?
[56] A Well, a school board meeting is actually an open meeting. I mean, as far as we are concerned, they can come any time and discuss any problem they have.
Q I didn't ask you that, Mr. Mallory. You said that your school board adopted an unwritten policy. Didn't you think that you owed it to these teachers who had

taught so diligently and faithfully in your school system, to have them come before the board and say, "Now, we have adopted a policy that your children must attend the public schools unless you have good reasons. If you don't give us good reasons, you won't be employed"? Now, don't you think that was the legal, and the American way of doing things?

MR. HICKMAN:
Objection.

THE COURT:
Sustained.
Rephrase your question.

MR. FARESE:
All right.
Q Did you do that?

MR. HICKMAN:
Well, we object. It's the same question.

THE COURT:
Overruled.

MR. FARESE:
[57] Q Did you do that, Mr. Mallory?
A We simply handed the policy to Mr. Hudson. I mean, as far as the carrying out of the policy. We didn't — the school board didn't give the policy to these teachers. We gave it to Mr. Hudson. And Mr. Hudson carries this on down through the channels.

Q Now, His Honor asked you about whether this policy came from the school board.
A It did come from the school board, but it was — the policies concerning the schools are handed to the attendance center principals, you know, for them to notify the teachers.
Q But didn't you think since this involved the livelihood of these teachers, their tenure and all, that they should have been given a written notice of this —
A Possibly so, now.
Q — advising them that if they disagreed they had the right to appeal to the board?
A Probably should have been done —
Q Yes, sir.
A — in that manner.
Q But that wasn't done, was it?
A Apparently not, no, sir. As far as I know.
Q Do you want to drop the word "apparently" and say "no, sir"?
[58] A As far as I know, it wasn't. I'll put it like that.

MR. FARESE:
Thank you, sir.

THE COURT:
Any redirect?

MR. HICKMAN:
No.

THE COURT:
All right.

You may stand down.
Who do you have next, sir?

MR. HICKMAN:
Mr. W. A. Matthews.

THE COURT:
All right.

MR. HICKMAN:
Your Honor, on behalf of the defendants, we ask the Court to take judicial notice of the Internal Revenue Bulletin Number 1971-12, dated March 22, 1971, announcement 71-26, at pages twenty-four and twenty-five.

THE COURT:
All right.

MR. FARESE:
Your Honor, we would object to that unless they [59] show the reason for that bulletin, the facts behind it. The bare bulletin itself, I think —

THE COURT:
All right.
Is this the ruling that came out following the litigation in the Washington, District of Columbia court?

MR. HICKMAN:
Yeah.

THE COURT:
All right. The Court will take judicial notice of that.

MR. HICKMAN:
I also ask the Court to take judicial notice of the Internal Revenue technical bulletin information attachment E from Internal Revenue Service, dated August 19, 1970, which is on file in the *Norwood* case, *Norwood v. Harrison,* WC-70-53-K, certified copy. And also, take judicial notice of an affidavit of Randolph W. Thrower, Commissioner of Internal Revenue, which indicates Calhoun Educational Foundation Corporation, Calhoun Academy, Calhoun City, Mississippi, as being one of eleven schools for which advance assurance of deductibility has been suspended.

MR. FARESE:
Your Honor, I would interpose the same objection, on the grounds that this does not fully set forth the [60] reasons why the tax exemption was removed or whether or not application was actually made for it.

MR. HICKMAN:
I might read that these are the first suspension actions taken under the forthwith order of June 26, 1970, issued by the District Court of the District of Columbia in the case of *Green v. Kennedy and Thrower,* covering schools in Mississippi. It is on file in the *Norwood* case.

THE COURT:
The Court will take judicial notice of that.

W. A. MATTHEWS,
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HICKMAN:

Q Would you state your name, please, sir.

A W. A. Matthews.

Q Where do you live, Mr. Matthews?

A Jackson, Mississippi.

Q And by whom are you employed?

A The Mississippi State Textbook Purchasing Board.

Q Of the State of Mississippi?

A Right.

Q Now, Mr. Matthews, who are the members of that [61] board?

A The Governor of the State of Mississippi, the State Superintendent of Education, and one appointed member from each of the judicial districts. Mr. Harrison from the north, Mrs. Irene Breland from the central district, and Mr. Barnett from the southern district.

Q Now, Mr. Harrison, is that Mr. D. L. Harrison?

A That's right.

Q Is that the Mr. Harrison that was a defendant in the *Norwood* case?

A Yes, sir.

Q Is that the Mr. Harrison that is presently teaching at the Calhoun Academy?

A That's my understanding.

Q All right. And he is on the State Textbook Purchasing Committee at this time?

A Yes, sir.

Q All right.

Mr. Matthews, with reference to free textbooks, were they ever furnished private schools in Mississippi?

A Calhoun Academy?

Q Well, yes, we will direct it to Calhoun Academy.

A According to my records, I have records back to 1969 and '70 that they were supplied.

Q All right.

[62] Now, are you familiar with the decision — this court's order in *Norwood v. Harrison*?

A Yes, sir.

Q And what did that decision require you to do in your official capacity in the textbook department of the State of Mississippi?

A Required me as Executive Secretary to notify each private school that was receiving textbooks from us at the present time to be notified of that court order, to send a copy of that court order and the background information required if a school desired to continue receiving free textbooks.

MR. HICKMAN:

We ask the Court at this time to take judicial notice of WC-70-53-K, *Norwood v. Harrison*.

THE COURT:

All right.

MR. HICKMAN:

Q Did you notify the Calhoun Academy?

A Yes, sir.

THE CLERK:
Exhibit Number Two for the Defendant for identification.

THE COURT:
Has Mr. Farese seen this?

(Exhibit passed to Counsel)

[63] MR. HICKMAN:
Q Can you identify the instrument I just handed you?
A It is an instrument we sent out to all the private schools on July 26, 1973.
Q And would you read that communication, please.

THE COURT:
It speaks for itself, I believe.

MR. HICKMAN:
All right.

THE COURT:
Aren't you going to offer it?

MR. HICKMAN:
Yes, sir.

THE COURT:
All right.

MR. HICKMAN:
Q In substance, what did that communication say?

A In substance, it said, "Enclosed is the regulation —"
Q Well, don't read it. Just in substance. Did you enclose the regulations required by the *Norwood* case?
A That's right, yes, sir. The background information questionnaire.
Q Now, I believe there was a questionnaire attached [64] as Exhibit A to the *Norwood* decision.
A That's right, yes, sir.
Q Now, was this questionnaire required to be completed by the private school if they desired to continue to receive free textbooks under the court's order.
A Yes, sir.
Q Did Calhoun academy complete this purchase and this certification and background information form?
A No, sir.

MR. HICKMAN:
I hand you two documents for identification.

THE COURT:
Did they file any application?

THE WITNESS:
No, sir.

THE COURT:
No application at all for state textbooks?

THE WITNESS:
(Moving head side to side)

THE CLERK:

Exhibit Number Three for the Defendant for identification.

MR. HICKMAN:

Q Now, Mr. Matthews, what is that document, in substance?

[65] A This is the second letter that we sent to all heads of private schools to indicate procedures for the returning of textbooks and also reiterating the dates that had to be followed as far as the court order is concerned.

Q All right.

Now, as far as the court order was concerned, when was the last date which this certification, background information form could have been completed?

A August 10, 1973, unless extended by the court.

Q Now, were you required by the court to make a report in the *Norwood* case and file it among the papers in the cause?

A Yes, sir.

Q Have you made such report?

A Yes, sir.

Q Does it show the Calhoun Academy to be included?

A No, sir.

Q Now, since your report was filed, have you had occasion to check your records in your office at Jackson, Mississippi, for additional correspondence and certification from the Calhoun Academy?

A We haven't had any.

Q What have you found, if anything?

A We haven't had any correspondence.

Q Of course, Mr. Harrison, I believe you have [66] testified, is a member of your board, and you have discussed this with him. You have had occasion to discuss this with him?

A Yes, sir.

Q And has he indicated —

MR. FARESE:

Now, Your Honor, we would object to what Mr. Harrison has indicated. He is not a party to this lawsuit, it would be hearsay.

MR. HICKMAN:

Your Honor, Mr. Harrison is a member of the State Textbook Purchasing Board, he is a defendant in this suit, he has been testified as teaching in public schools.

MR. FARESE:

He is not a defendant.

THE COURT:

Well, as I understand it, you say there was no application filed at all for a continuation of textbooks.

THE WITNESS:

That's right, Your Honor.

THE COURT:

Now, did the academy have textbooks in its possession —

THE WITNESS:
Yes, sir.

[67] THE COURT:
— that belonged to the State? Have they been delivered back?

THE WITNESS:
We have no instrument to indicate that they have been turned in at this time, Judge.

THE COURT:
Do you know what the fact of the matter is?

THE WITNESS:

THE WITNESS:
They have until November 12 to do this.

THE COURT:
All right.

MR. HICKMAN:
Q Mr. Matthews, have you received correspondence from the Department of the Treasury, Internal Revenue Service?
A Yes, sir.
Q Do you have such correspondence?
A Yes, sir.
Q And about what date does it bear?
A July 3, 1973.
Q And it is from whom?
A From the Chief of Review Staff, Internal Revenue Service.

Q What is the substance of this correspondence?
A It gave us the procedures or the outline of [68] procedures for the Internal Revenue Service declaring the schools with an open-door policy and for I.R.S. exemption status; and also two lists, one indicating schools that were on the tax-exempt status, another listing of schools that had been removed from the tax-exempt status.
Q Did the record indicate that the Calhoun Academy, also referred to as the Calhoun Educational Foundation Corporation, had at one time had the tax-exempt privilege?
A The list indicates it was removed, yes, sir.
Q And it has been removed?

THE COURT:
Now, has there ever been any restoration by the Internal Revenue?

THE WITNESS:
No indication, Your Honor.

THE COURT:
All right.

MR. HICKMAN:
Q That was dated July of '73?
A Yes, sir.

MR. HICKMAN:
We would like to have that marked for identification.

THE COURT:
All right.

THE CLERK:
[69] Defendant's Exhibit Number Four for identification.

MR. HICKMAN:
I offer this in evidence as Exhibit One to the testimony of Mr. Matthews.

THE COURT:
Mr. Farese, any objection to this offering?

MR. FARESE:
Your Honor, of course, I object to it on the grounds that the proper predicate has not been laid. The reasons for these have not been —

THE COURT:
Objection overruled. Let them be received.

MR. HICKMAN:
I believe I understood that the Court took judicial notice of the *Norwood* file.

THE COURT:
Yes, sir.

MR. HICKMAN:
In its entirety?

THE COURT:
Yes, sir.

MR. HICKMAN:
I believe that's all.

THE COURT:
All right.
[70] You may cross-examine.

CROSS-EXAMINATION

BY MR. FARESE:
Q Mr. Matthews, when you told the Court that the textbooks had not been received yet, of course, they have till November what?
A Twelfth, 1973.
Q And they could make an application at that time, could they not?
A No, sir.
Q They couldn't?
A Not without permission of the court.
Q Well, I am saying, if they got the court's permission, they could make the application?
A Yes, sir.
Q Now, the mere fact that a private school does not care to take advantage of the free textbooks does not mean anything to you, does it?
A No, sir.
Q They have that Constitutional right to elect not to get free textbooks, right?
A Yes, sir.

Q And the mere fact that a school would decide not to take them, you can't impute anything to that, can you?
[71] A No, sir.

MR. FARESE:
I have no further questions of this witness.

THE COURT:
Any redirect?

MR. HICKMAN:
No, sir.

THE COURT:
Gentlemen, where do we stand on further time in this case? Do you have some documents to offer?

MR. RAYBORN:
Yes, sir, Your Honor.

THE COURT:
Mr. Hickman, do you have further live testimony?

MR. HICKMAN:
If we could have a recess, Your Honor, at this point it might be that we could expedite.

THE COURT:
Very well. We will take a fifteen-minute recess at this time.

(RECESS)

THE COURT:
Proceed, Counsel.

MR. RAYBORN:
[72] Your Honor, we would like the Court to take judicial notice of its own order in WC-66-37, dated August 9, 1968, in Civil Order Book 17, at Page 20.

THE COURT:
All right. You may pass it up. Notice will be taken of the Court's order.

MR. RAYBORN:
We would further like to introduce at this time a certified copy, certified by Heber Ladner, Secretary of State of the State of Mississippi, of the charter of Calhoun Corporate Foundation, the charter dated August 22, 1968.

THE CLERK:
That will be Defendant's Exhibit Number Six, and the order is marked Exhibit Number Five.

THE COURT:
Let them be received.

MR. RAYBORN:
We would also like to introduce the copies, certified, of the Monitor Herald on file with the Chancery Clerk of Calhoun County, Mississippi, pursuant to Section

1260 of the Mississippi Code and as certified pursuant to Section 1725, for introduction into this Court. Copies of the Monitor Herald of June 30, 1966, with reference to a particular article of October 27, 1966.

THE COURT:
[73] All right.

MR. RAYBORN:
Of June 15, 1967, of August 25, 1966, and of July 28, 1966.

THE COURT:
All right.

THE CLERK:
That will be Defendant's Exhibit Number Seven, Composite Exhibit.

THE COURT:
Objection?

MR. FARESE:
I have not seen them, Your Honor.

THE COURT:
Pass them to Mr. Farese.

MR. FARESE:
Your Honor, on Exhibit Seven, I am just trying to see what connection it has with the case.

MR. RAYBORN:
Do you want me to respond?

MR. FARESE:
Your Honor, of course, he is just offering it for identification purposes.

MR. RAYBORN:
No, Your Honor, I believe I asked that be —

[74] THE COURT:
Yes, he is offering them in evidence. Do you have any objection?

MR. FARESE:
Yes, sir, I sure do, sir.

THE COURT:
All right. These articles go back several years before the court's desegregation order?

MR. RAYBORN:
Yes, sir, Your Honor. These articles are pertaining to the Citizens Council and they are pronouncements and standing that they took on the desegregation of the schools and on the private school, which we feel is relevant to the contribution of the Citizens Council to the Calhoun Academy.

MR. FARESE:
But, Your Honor, the Citizens Council is not a party to this lawsuit, it has nothing in the world to do with

this lawsuit. The sole issue is whether or not these teachers should be allowed to teach in the public schools.

THE COURT:
Your objection is noted and overruled. Let them be received.
Do you have further evidence, gentlemen?

MR. HICKMAN:
[75] We rest.

THE COURT:
Mr. Farese, do you have evidence?

MR. FARESE:
Your Honor, you have allowed these in evidence. I don't know who to cross-examine on these.

THE COURT:
Well, you may call whomever you wish.

MR. FARESE:
Well, then I will call on Counsel as a witness, because I have got to talk to somebody about these exhibits.

THE COURT:
Well, now, let's see, gentlemen. The Court's immediate concern is with counsel in the *Mel Bray* case. I am trying to determine whether I should release them until one thirty. I had asked them to be back by ten thirty. How long do you anticipate you will take?

MR. FARESE:
If they will agree to let me introduce the bylaws — and we will assure Counsel as an officer of the Court that Mr. Henry Lackey made these — the by-laws of the Calhoun County Foundation, the application for position as teacher and the application for admission, we would rest our case.

THE COURT:
Show him the documents, then. Perhaps you can [76] agree.

MR. FARESE:
I have already shown them.

THE COURT:
Mr. Lackey, of course, could take the stand and identify those documents.

MR. FARESE:
Yes, sir.
Your Honor, they have agreed.

THE COURT:
All right. Let them be submitted as a collective exhibit.

MR. FARESE:
All right, sir.

THE CLERK:
Exhibit Number Eight for the Plaintiffs.

MR. FARESE:
The purpose of that is to show that the no mention of race, creed, or color.

THE COURT:
All right.

MR. FARESE:
We rest, Your Honor.

THE COURT:
All right.
[77] Now, gentlemen, I have read your briefs. These are interesting questions of law in this case. They are novel. I would ordinarily give you an opportunity to make an oral argument at this time except for the pressing conditions of my docket. We will have to forego that. I am going to take the case under advisement. I think it justifies a written opinion. And if you desire to file an additional submission, either side, based on the evidence today, you may do so. It is not mandatory, but you may do so within the next seven days. Just file whatever you might care to in the way of a supplemental legal memorandum.

MR. FARESE:
Your Honor, I know this is unusual, but I think this is a case of such utmost importance, not only to Mississippi, but to the entire United States, would the Court allow us to make an oral argument at another time? Even half an hour.

THE COURT:
Well, surely. I think part of the due process is to hear counsel orally.

MR. FARESE:
Not today, at any time that is convenient to the Court.

THE COURT:
Well, I will be back here Monday morning. If the [78] case coming up concludes today, I will have some free time Monday morning. What is the condition of your calendar, gentlemen?

MR. FARESE:
Your Honor, this case has preference with me. Any time you say.

THE COURT:
I could give you thirty minutes to the side Monday morning.

MR. RAYBORN:
Your Honor, are we to take it, then, that the briefing scheduled that we were put on with reference to the reply briefs is off, in light of this?

THE COURT:
No, I would still like to have your written briefs. But sometimes lawyers like to put it both ways to the court, orally and in writing. I will hear you. Mr. Farese would like to argue it orally, I want to give him that opportunity.

MR. HICKMAN:
Monday will be all right.

THE COURT:
All right.
I would still want additional memoranda if you want to file them within the next week.
[79] All right, gentlemen, thank you. Be back at eleven o'clock Monday morning.

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[6] [Title Omitted in Printing]

COMPLAINT

Filed: Aug. 9, 1973

COME NOW Billy D. Cook, Loula Juanita Milton Adams, and Mrs. W. P. Wright, Plaintiffs in the above styled and numbered cause and for cause of action would show the following, to-wit:

I.

(PARTIES)

Plaintiffs would show that they are:

a) *BILLY D. COOK*, an adult, resident citizen of Calhoun County, Mississippi, residing at Post Office Box 185, Calhoun City, Mississippi.

b) *LOULA JUANITA MILTON ADAMS*, an adult, resident citizen of Calhoun County, Mississippi, residing at Post Office Box 214, Calhoun City, Mississippi.

c) *MRS. W. P. WRIGHT*, an adult, resident citizen of Calhoun County, Mississippi, residing at Post Office Box 447, Calhoun City, Mississippi.

Plaintiffs would show that the Defendants herein are:

a) *ROGER W. HUDSON*, an adult, resident citizen of Calhoun County, Mississippi, residing at Calhoun City, Mississippi, where he may be found for services of process in this cause. Said Defendant is sued individually and as Principal of the Calhoun City Attendance Center of the Calhoun County, Mississippi Public School System.

b) *JOHN BURT*, an adult, resident citizen of Calhoun County, Mississippi, residing at Vardaman, Mississippi, where he may be found for service of process in this cause. Said Defendant is being sued individually and as Superintendent of the Calhoun County Board of Education.

c) *JAMES SIDNEY WARNER*, residing at Big Creek, Mississippi:

d) *R. W. MALLORY*, residing at Route 3, Calhoun City, Mississippi;

e) *NORMAN WILTON GRIFFIN*, residing at Vardaman, Mississippi;

f) *BROOKS BRASHER*, residing at Bruce, Mississippi;

g) *N. F. HANSON*, residing at Bruce, Mississippi, all of whom are adult resident citizens of Calhoun County, Mississippi, where they may be found for service of process.

Said Defendants, James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, and N. F. Hanson are sued individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi, and as the Board of Education of Calhoun County, Mississippi.

h) *PRINCIPAL*, Calhoun City Attendance Center, whose agent for service of process in this cause is the said Roger W. Hudson.

i) *SUPERINTENDENT* of the Calhoun County Board of Education, whose agent for service of process is the said John Burt.

j) *BOARD OF EDUCATION* of Calhoun County, Mississippi, whose agent for service of process is R. W. Mallory, President of the Calhoun County Board of Education, and an adult, resident citizen of Calhoun County, Mississippi, residing at Route 3, Calhoun City, Mississippi, where he may be found for service of process in this cause.

II.

(JURISDICTION)

This Court has jurisdiction of this cause pursuant to 28 U.S.C. §1331 and 1343 and 42 U.S.C. §1981, 1983, 1985(3) and 1986. This is an action to redress the deprivation under color of statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured under the United States Constitution, particularly under the provisions of the First, Fifth, and Fourteenth Amendments to the United States Constitution, under Sections 1981, 1983, 1985, and 1988, Title 42 of the United States Code and under the laws, statutes, and Constitutions of the State of Mississippi.

III.

(VENUE)

The acts and transactions giving rise to Plaintiffs' cause of action upon which this Complaint is based occurred in Calhoun County, Mississippi. All of the Defendants herein, who are natural persons, are resident citizens of Calhoun County, Mississippi and Calhoun County, Mississippi is a county within the Northern Judicial District, Western Division of the United States District Court of Mississippi.

IV.

During all times herein material, the individual defendants and each of them, separately and in con-

cert, acted under color and pretense of law, to-wit: under the color of the statutes, ordinances, regulations, customs and usages of the State of Mississippi and the County of Calhoun. Each of the individual defendants, separately and in concert, engaged in the illegal conduct herein mentioned to the injury of Plaintiffs and deprived Plaintiffs of the rights, privileges and immunities secured to them by the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and the laws of the United States and the State of Mississippi.

V.

Plaintiffs would show that each of them is a teacher by profession. Under the laws of the State of Mississippi, they are each duly and lawfully qualified to teach and occupy positions as teachers in the public schools of this State.

Plaintiffs would further show that for the school term, beginning in 1972, Plaintiffs were employed and taught school in the Calhoun County School System, namely, at the Calhoun City Attendance Center. Said Plaintiffs taught in said school system for the entire school year which ended in June of 1973.

VI.

Plaintiffs would show that each of them is a parent and has children who are of school age. That, for the school year, 1972-1973, the children of Plaintiffs were enrolled in and attended a private school.

VII.

Plaintiffs would show that in July of 1972, defendant, Roger W. Hudson, was employed as principal of the Calhoun City Attendance Center. Immediately, thereafter, said defendant, Roger W. Hudson, informed Plaintiffs that they would not be recommended for their positions for the 1973-74 school term unless their children were enrolled in the public school's. Thereafter, said defendant on several more occasions informed Plaintiffs that they were good teachers but that they would not be rehired for the 1973-74 school term, unless they withdrew their children from the school they were attending and enrolled them in the public school system. That this was the only reason they would not be rehired.

Plaintiffs would show that each of them took the position that he had no obligation to enroll his children in the public school system, as a condition precedent to their being rehired for employment in the school system of Calhoun County. That the child of Mrs. Loula Juanita Milton Adams is afflicted with a speech defect and that this played a major part in her decision to send this child to a private school. Acting pursuant to their beliefs and in the exercise of their Constitutional and civil rights as citizens of the United States of America, Plaintiffs refused to withdraw their children from the school they were attending.

VIII.

Thereafter in April of 1973, Defendant, Roger W. Hudson, as principal of the Calhoun City Attendance

Center, with the full knowledge, consent, approval and direction of the other defendants herein, wrongfully and maliciously, without just cause, failed and refused to recommend Plaintiffs or any of them for teaching positions in the Calhoun City Attendance Center. The sole and only reason for said Defendant's action was the fact that Plaintiffs, in the lawful exercise of their constitutional rights to choose and determine their children's educational environment, chose not to send their children to public school.

Plaintiffs allege and aver that the liberty of a free people includes the right to educate one's child in a school of the parents' choice, public, private or parochial. That Plaintiffs exercised this right, at their own individual expenses. Plaintiffs aver that the attendance at public schools has never been compulsory and that parents, such as Plaintiffs, remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated, without unlawful coercion or harassment from any source.

IX.

Plaintiffs would further show that they are being discriminated against, solely because they are parents, beside being teachers. That the condition imposed upon them is one which single, unmarried and childless teachers are not subjected to. That because they are parents, they have been issued an ultimatum to either send their children to public schools — or they would not be rehired. That the refusal to rehire

was not based upon any reason, other than that Plaintiffs have seen fit to assert their constitutional rights to send their children to a school of their choice.

Plaintiffs further allege and aver that the policy of the school officials of Calhoun County in requiring all teachers to send their children to a public school is fraught with invidious discrimination.

X.

Plaintiffs would further show that the Defendants, John Burt, James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher and N. F. Hanson instigated and conspired among themselves and with others to use threats of unemployment for the purpose of coercing Plaintiffs individually and as a group to enroll their children in public school. That each of said Defendants had knowledge that Plaintiffs would be threatened with loss of their teaching contracts and that the sole purpose of these threats — which were calculated to deny and infringe upon Plaintiffs' exercise of their Constitutional Rights — was to coerce Plaintiffs to enroll their children in public school. That all of said Defendants knew that these wrongs were to be committed and had it within their power to prevent or aid in preventing the commission of same; but, nevertheless, said Defendants neglected and refused to take any action whatsoever to prevent same; and, to the contrary, said Defendants entered into the conspiracy and adopted its purpose as their own and participated actively in furtherance thereof.

Plaintiffs would show that Defendant, John Burt, advised Plaintiff, Billy D. Cook, that he was entitled to a hearing before the County School Board but stated that such action was entirely useless as he (the plaintiff) was "out". Said Defendant never advised the other Plaintiffs that they were entitled to any hearing.

Plaintiffs would further show that, in furtherance of the said conspiracy, persons other than Plaintiffs herein, who were employed by the Calhoun County School System were informed that they, also, would not be rehired for the 1973-1974 school term unless their children — then enrolled in private schools — were enrolled in the Calhoun County Public Schools. Plaintiffs would show that these other teachers were members of a race other than that to which Plaintiffs belong and were, in fact, members of the Black Race. That, although the said Black teachers did not enroll their children in the public school, they did not suffer the loss of their teaching contracts for the 1973-1974 school term.

XI.

Plaintiffs would show that pursuant to Section 6282-07 of the Mississippi Code of 1942, Recompiled, as Amended, the failure of the defendant, Roger W. Hudson, as Principal of the Calhoun City Attendance Center, to recommend Plaintiffs for employment, resulted in Plaintiffs being denied a contract of employment. Said Defendant's actions were not based upon any exercise of reasonable discretion on his part but were intended to and did in fact result in a wrongful,

malicious and intentional denial to Plaintiffs of their civil rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America.

XII.

Plaintiffs would further show that as a direct and proximate result of the actions of the Defendants herein, Plaintiffs with the exception of Billy D. Cook, are presently unemployed as teachers. That the Plaintiff, Billy D. Cook, was able to obtain employment for the 1973-1974 School term at a private school at a substantially reduced salary and compensation. That all of the Plaintiffs have been damaged and injured in their reputation in their profession as well as financially.

Plaintiffs would show that as a result of the wrongful actions of the Defendants, they have been further denied the rights of increments to their respective salaries and the right to State of Mississippi retirement benefits, to which they would have been entitled, but, for the wrongful acts of the defendants herein.

XIII.

Plaintiffs would further show that the actions of Plaintiffs have been wilful, malicious and patently unlawful and unconstitutional. That Defendants should be immediately temporarily enjoined from failing and

refusing to employ Plaintiffs for the reasons hereinabove set forth.

PREMISES CONSIDERED, Plaintiffs pray that this Complaint be received and filed and that proper process issue for the Defendants herein named; and, that this Court will grant unto Plaintiffs the following relief:

A) Plaintiffs, Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, move the Court for a preliminary injunction in the above entitled cause enjoining the defendants, their agents, servants, employees and attorneys and those persons in active concert or participation with them from failing and refusing to do all things necessary to effect a contract of employment as a school teacher in the Calhoun County School System, Calhoun City Attendance Center, between said County School System and the Plaintiffs.

The grounds in support of this Motion are as follows:

1) The verified Complaint of Plaintiffs in this cause and the proof in support thereof which will be presented at a hearing on this application for preliminary injunction, clearly establish that Plaintiffs are being denied a constitutional right, to-wit: the right, as a citizen of the United States of America, to choose a school, other than a public school, to which to send their children. Said right is protected by the First, Fifth and Fourteenth Amendments to the United States Constitution.

2) Unless said defendants are enjoined, Plaintiffs will suffer immediate and irreparable injury, loss and damage as more particularly appears in the verified complaint filed herein.

B) Said Plaintiffs further move the Court that the trial of this action on the merits be advanced and consolidated with the hearing of this motion for preliminary injunction. The grounds in support of consolidation are as follows: A substantial part of the evidence offered on Plaintiffs' said application will be relevant to the merits and will be presented in such form as to qualify for admission at the trial proper. Repetition of evidence will be avoided, no delay in the disposition of the application for preliminary injunction will result from consolidation, and the final disposition of the action will be expedited.

C) Plaintiffs further pray that judgment will be entered sustaining Plaintiffs' allegations in their Complaint and ordering and directing Defendants to reinstate Plaintiffs as teachers in the Calhoun County School System, with full back pay and benefits.

D) And further, or in the alternative, that Plaintiffs be awarded judgment against Defendants for actual damages in the amount of $25,000.00 each and punitive damages in the amount of $10,000.00 each, or a total of $105,000.00, together with all costs herein.

And if mistaken in the relief prayed for or entitled to then your Plaintiffs pray for such other, further,

general, special and specific relief to which they may be entitled and as to equity doth obtain. As in duty bound, they will ever pray.

RESPECTFULLY SUBMITTED,
FARESE, FARESE, JONES & FARESE
Post Office Box 98
ASHLAND, MISSISSIPPI
/s/ JOHN B. FARESE
JOHN B. FARESE
ATTORNEYS FOR PLAINTIFFS

STATE OF MISSISSIPPI
COUNTY OF LAFAYETTE

Personally appeared before me, the undersigned authority in and for the county and state aforesaid the within named BILLY D. COOK, LOULA JUANITA MILTON ADAMS, AND MRS. W. P. WRIGHT, who after being by me first duly sworn according to law on oath stated that the facts, statements, allegations, and averments contained in the above and foregoing Complaint are true and correct as therein stated and that the relief sought is just and should be granted.

/s/ BILLY D. COOK
BILLY D. COOK
/s/ LOULA JUANITA MILTON ADAMS
LOULA JUANITA MILTON ADAMS
/s/ MRS. W. P. WRIGHT
MRS. W. P. WRIGHT

SWORN TO AND SUBSCRIBED BEFORE ME, this the 9th day of August, 1973.

/s/ SHERRY J. HUNTER
Deputy Clerk
Northern District of Mississippi

(SEAL)

[Certificate of Service Omitted in Printing]

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[7] [Title Omitted in Printing]

ANSWER

Filed: Sep. 4, 1973

COMES NOW, Robert W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi, Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education and Board of Education of

Calhoun County, Mississippi, Defendants in the above styled and numbered cause, by and through their counsel, and for their answer to the Complaint filed herein against them, or so much thereof as they are advised is necessary for them to answer, answering, state as follows:

FIRST DEFENSE

This Court lacks jurisdiction over the Defendants herein and the subject matter hereof.

SECOND DEFENSE

The Complaint fails to state a cause of action against the Defendants upon which relief can be granted.

THIRD DEFENSE

Defendants are immune to this action and to the relief sought by the Plaintiffs against them herein.

FOURTH DEFENSE

Defendants are not amenable to this suit in their capacity as the Board of Education of Calhoun County, Mississippi.

And now, answering the Complaint filed herein against them paragraph by paragraph, answering Defendants answer and as follows, to-wit:

I

(PARTIES)

Answering Defendants admit the allegations of paragraph I of the Complaint filed herein against them.

II

(JURISDICTION)

Answering Defendants deny the allegations of paragraph II of the Complaint filed herein against them.

III.

(VENUE)

Answering Defendants admit that all the Defendants herein, who are natural persons, are resident citizens of Calhoun County, Mississippi, and Calhoun County, Mississippi, is a county within the Northern Judicial District, Western Division, of the United States District Court of Mississippi. Answering Defendants deny that any acts or transactions took place which give rise to a cause of action in the Plaintiffs.

IV.

Answering Defendants deny the allegations of paragraph IV of the Complaint filed herein against them.

V.

Answering Defendants admit the allegations of paragraph V of the Complaint filed herein against them, except that Defendants deny that the school year beginning in 1972 and ending in 1973 ended in June of 1973, but rather would show that said school year ended in May 1973.

VI.

Answering Defendants admit allegations of Paragraph VI of the Complaint filed herein against them.

VII.

Answering Defendants admit that in July of 1972, Roger W. Hudson, assumed the duties of Principal of the Calhoun City Attendance Center. Further, Defendants admit that said Defendant Roger W. Hudson informed the Plaintiffs that they would not be recommended for their positions for the 1973-1974 school term unless their children were enrolled in the public schools. Defendants admit that this was the only reason that Plaintiff Adams and Wright would not be rehired, but deny that this is the only reason that Plaintiff Cook would not be rehired. Defendants deny any other material allegations of the first unnumbered paragraph of paragraph VI of the Complaint filed herein against them, not specifically admitted herein.

Answering the second unnumbered paragraph of paragraph VII of the Complaint filed herein against

them, Defendants deny that each of the Plaintiffs took the position that he had no obligation to enroll his children in the public school system, as a condition precedent to their being rehired for employment in the school system of Calhoun County. Answering Defendants are without sufficient information or knowledge so as to form a belief as to the remaining allegations contained in the second unnumbered paragraph of paragraph VII of the Complaint filed herein against them, and therefore, for the purpose of demanding strict legal proof thereof should the same become material, answering Defendants deny the remaining allegations contained in the second unnumbered paragraph of paragraph VII of the Complaint filed herein against them.

VIII.

Answering the first unnumbered paragraph of paragraph VIII of the Complaint filed herein against them, Defendants admit that Robert W. Hudson did not recommend the Plaintiffs or any of them for a teaching position in the Calhoun City Attendance Center. Answering Defendants deny all other allegations contained in the first unnumbered paragraph of paragraph VIII of the Complaint filed herein against them.

Answering the second unnumbered paragraph of paragraph VIII of the Complaint filed herein against them, Defendants deny any material allegations contained therein.

IX.

Answering Defendants deny the allegations of paragraph IX of the Complaint filed herein against them.

X.

Answering the first unnumbered paragraph of paragraph X of the Complaint filed herein against them, answering Defendants deny any material allegations contained therein.

Answering the second unnumbered paragraph of paragraph X of the Complaint filed herein against them, answering Defendants admit that Plaintiff Billy D. Cook was advised that he was entitled to a hearing before the County School Board. Answering Defendants would show that Plaintiff Wright was also advised that she was entitled to a hearing before the County School Board. Answering Defendants admit Plaintiff Adams was not advised that she was entitled to a hearing before the County School Board. Answering Defendants deny any other material allegations contained in the second unnumbered paragraph of paragraph X of the Complaint filed herein against them.

Answering the third unnumbered paragraph of paragraph X of the Complaint filed herein against them, answering Defendants deny the allegations contained therein.

XI.

Answering Defendants deny the allegations contained in paragraph XI of the Complaint filed herein against them.

XII.

Answering the first unnumbered paragraph of paragraph XII of the Complaint filed herein against them, answering Defendants admit that Plaintiff Billy D. Cook is employed for the 1973-1974 school term at a private school. Answering Defendants deny the remaining allegations contained in the first unnumbered paragraph of paragraph XII of the Complaint filed herein against them.

Answering the second unnumbered paragraph of paragraph XII of the Complaint filed herein against them, answering Defendants deny the allegations contained therein.

XIII.

Answering Defendants deny each and every allegation of paragraph XIII of the Complaint filed herein against them.

XIV.

Answering Defendants deny each and every allegation of the prayer for relief contained in the Complaint

filed herein against them. Defendant Board of Education of Calhoun County, Mississippi and the individual members of said Board being sued in their capacity as such, would show that this Court is without jurisdiction to grant the relief sought against them in paragraph number D of the prayer for relief contained in the Complaint filed herein against them. Defendant Principal of Calhoun City Attendance Center and Defendant Superintendent of the Calhoun County Board of Education and the individuals being sued in their capacity as such, would show that this Court is without jurisdiction to grant the relief sought against them in paragraph D of the prayer for relief contained in the Complaint filed herein against them. Defendants would show that the Plaintiffs are entitled to no sum whatsoever from them.

XV.

Defendants would show unto the Court that the Plaintiffs have not exhausted the remedies available to them under the laws and statutes of the State of Mississippi, if they are entitled to any remedies. Therefore, no injunctions or orders of this Court should issue until Plaintiffs have so exhausted such remedies available to them.

XVI.

Further answering affirmatively and in the alternative, Defendants would show that in a good faith effort, based upon reasonable discretion, and in an attempt to

carry out the letter and spirit of prior Orders of this Court, and the intention of this Court, and in an attempt to carry out the spirit and intent of the decisions and rulings of the Supreme Court of the United States, a policy was formulated wherein prior to the employment of a new teacher or the re-employment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County, or said teacher would not be employed or re-employed.

Further answering affirmatively and in the alternative, Defendants would show that such requirement is reasonable and significantly related to the job performance and effectiveness of a classroom teacher.

Further answering affirmatively and in the alternative, Defendants would show that such requirement is imperative if the best interests of the children attending the public schools of Calhoun County, Mississippi are to be served.

Further answering affirmatively and in the alternative, Defendants would show that said requirement is significantly related to obtaining the total support of the entire school system, both teachers, employees, and students, in assisting the Superintendent of Education and the School Board of Calhoun County, Mississippi in implementing and carrying out the prior orders of this Court and in carrying out the spirit and intent of the decisions and rulings of the Supreme Court of the United States.

And now, Robert W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education, and Board of Education of Calhoun County, Mississippi, having fully answered the Complaint filed herein against them, respectfully pray that said Complaint and this cause be dismissed as to the Defendants at the cost of the Plaintiff.

Answering Defendants pray for general relief.

Respectfully submitted,
ROBERT W. HUDSON, individually and in his capacity as Principal of the Calhoun City Attendance Center; JOHN BURT, individually and in his capacity as Superintendent of Calhoun County Board of Education; JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER and N. F. HANSON, individually and in

their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; PRINCIPAL OF CALHOUN CITY ATTENDANCE CENTER: SUPERINTENDENT OF THE CALHOUN COUNTY BOARD OF EDUCATION: and BOARD OF EDUCATION OF CALHOUN COUNTY, MISSISSIPPI, Defendants.

SUMNERS & HICKMAN
Attorneys at Law
Oxford, Mississippi
/s/ WILL A. HICKMAN
WILL A. HICKMAN
Attorneys for Defendants

THE STATE OF MISSISSIPPI
THE COUNTY OF LAFAYETTE

Personally appeared before me, the undersigned authority in and for the State and County aforesaid, WILL A. HICKMAN, of Sumners & Hickman, Attorneys at Law, Oxford, Mississippi, who on oath states that he is one of the attorneys for the Defendants in the above and foregoing Answer, duly authorized in the premises; that the matters and things positively stated in the foregoing Answer are, of affiants own personal knowledge, true and therein stated, and that

those stated on information and belief are upon trustworthy information which affiant believes to be true, and that this verification is upon his personal knowledge or information as the case may be of the affiant.

/s/ WILL A. HICKMAN
WILL A. HICKMAN
Solicitor for Defendants

SWORN TO AND SUBSCRIBED before me, this the 4th day of September, 1973.

/s/ PATSY H. WALLER
Chancery Clerk

(SEAL)

[Certificate of Service Omitted in Printing]

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[8] [Title Omitted in Printing]

AMENDED ANSWER

Filed: Sep. 5, 1973

COMES NOW, Roger W. Hudson (referred to as Robert W. Hudson in the Complaint filed herein), individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually

and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi, Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education and Board of Education of Calhoun County, Mississippi, Defendants in the above styled and numbered cause, by and through their counsel pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure, and for their Amended Answer to the Complaint filed herein against them, or so much thereof as they are advised is necessary for them to answer, answering, state as follows:

FIRST DEFENSE

This Court lacks jurisdiction over the Defendants herein and the subject matter hereof.

SECOND DEFENSE

The Complaint fails to state a cause of action against the Defendants upon which relief can be granted.

THIRD DEFENSE

Defendants are immune to this action and to the relief sought by the Plaintiffs against them herein.

FOURTH DEFENSE

Defendants are not amenable to this suit in their capacity as the Board of Education of Calhoun County, Mississippi.

And now, answering the Complaint filed herein against them paragraph by paragraph, answering Defendants answer and allege as follows, to-wit:

I.

(PARTIES)

Answering Defendants admit the allegations of paragraph I of the Complaint filed herein against them.

II.

(JURISDICTION)

Answering Defendants deny the allegations of paragraph II of the Complaint filed herein against them.

III.

(VENUE)

Answering Defendants admit that all the Defendants herein, who are natural persons, are resident citizens of Calhoun County, Mississippi, and Calhoun

County, Mississippi, is a county within the Northern Judicial District, Western Division, of the United States District Court of Mississippi. Answering Defendants deny that any acts or transactions took place which give rise to a cause of action in the Plaintiffs.

IV.

Answering Defendants deny the allegations of paragraph IV of the Complaint filed herein against them.

V.

Answering Defendants admit the allegations of paragraph V of the Complaint filed herein against them, except that Defendants deny that the school year beginning in 1972 and ending in 1973 ended in June of 1973, but rather would show that said school year ended in May of 1973.

VI.

Answering Defendants admit the allegations of paragraph VI of the Complaint filed herein against them.

VII.

Answering Defendants admit that in July of 1972, Roger W. Hudson, assumed the duties of Principal of the Calhoun City Attendance Center. Further, Defen-

dants admit that said Defendant Roger W. Hudson informed the Plaintiffs that they would not be recommended for their positions for the 1973-1974 school term unless their children were enrolled in the public schools. Defendants admit that this was the only reason that Plaintiffs Adams and Wright would not be rehired, but deny that this is the only reason that Plaintiff Cook would not be rehired. Defendants deny any other material allegations of the first unnumbered paragraph of paragraph VII of the Complaint filed herein against them, not specifically admitted herein.

Answering the second unnumbered paragraph of paragraph VII of the Complaint filed herein against them, Defendants deny that each of the Plaintiffs took the position that he had no obligation to enroll his children in the public school system, as a condition precedent to their being rehired for employment in the school system of Calhoun County. Answering Defendants are without sufficient information or knowledge so as to form a belief as to the remaining allegations contained in the second unnumbered paragraph of paragraph VII of the Complaint filed herein against them, and therefore, for the purpose of demanding strict legal proof thereof should the same become material, answering Defendants deny the remaining allegations contained in the second unnumbered paragraph of paragraph VII of the Complaint filed herein against them.

VIII.

Answering the first unnumbered paragraph of paragraph VIII of the Complaint filed herein against them, Defendants admit that Roger W. Hudson did not recommend the Plaintiffs or any of them for a teaching position in the Calhoun City Attendance Center. Answering Defendants deny all other allegations contained in the first unnumbered paragraph of paragraph VIII of the Complaint filed herein against them.

Answering the second unnumbered paragraph of paragraph VIII of the Complaint filed herein against them, Defendants deny any material allegations contained therein.

IX.

Answering Defendants deny the allegations of paragraph IX of the Complaint filed herein against them.

X.

Answering the first unnumbered paragraph of paragraph X of the Complaint filed herein against them, answering Defendants deny any material allegations contained therein.

Answering the second unnumbered paragraph of paragraph X of the Complaint filed herein against them, answering Defendants admit that Plaintiff Billy D. Cook was advised that he was entitled to a hearing

before the County School Board. Answering Defendants would show that Plaintiff Wright was also advised that she was entitled to a hearing before the County School Board. Answering Defendants admit that Plaintiff Adams was not advised that she was entitled to a hearing before the County School Board. Answering Defendants deny any other material allegations contained in the second unnumbered paragraph of paragraph X of the Complaint filed herein against them.

Answering the third unnumbered paragraph of paragraph X of the Complaint filed herein against them, answering Defendants deny the allegations contained therein.

XI.

Answering Defendants deny the allegations contained in paragraph XI of the Complaint filed herein against them.

XII.

Answering the first unnumbered paragraph of paragraph XII of the Complaint filed herein against them, answering Defendants admit that Plaintiff Billy D. Cook is employed for the 1973-1974 school term at a private school. Answering Defendants deny the remaining allegations contained in the first unnumbered paragraph of paragraph XII of the Complaint filed herein against them.

Answering the second unnumbered paragraph of paragraph XII of the Complaint filed herein against them, answering Defendants deny the allegations contained therein.

XIII.

Answering Defendants deny each and every allegation of paragraph XIII of the Complaint filed herein against them.

XIV.

Answering Defendants deny each and every allegation of the prayer for relief contained in the Complaint filed herein against them. Defendant Board of Education of Calhoun County, Mississippi and the individual members of said Board being sued in their capacity as such, would show that this Court is without jurisdiction to grant the relief sought against them in paragraph number D of the prayer for relief contained in the Complaint filed herein against them. Defendant Principal of Calhoun City Attendance Center and Defendant Superintendent of the Calhoun County Board of Education and the individuals being sued in their capacity as such, would show that this Court is without jurisdiction to grant the relief sought against them in paragraph D of the prayer for relief contained in the Complaint filed herein against them. Defendants would show that the Plaintiffs are entitled to no sum whatsoever from them.

XV.

Defendants would show unto the Court that the Plaintiffs have not exhausted the remedies available to them under the laws and statutes of the State of Mississippi, if they are entitled to any remedies. Therefore, no injunctions or orders of this Court should issue until Plaintiffs have so exhausted such remedies available to them.

XVI.

Further answering affirmatively and in the alternative, Defendants would show that in a good faith effort, based upon reasonable discretion, and in an attempt to carry out the letter and spirit of prior Orders of this Court, and the intention of this Court, and in an attempt to carry out the spirit and intent of the decisions and rulings of the Supreme Court of the United States, a policy was formulated wherein prior to the employment of a new teacher or the re-employment of an existing teacher, if the children of any such teacher, if living in Calhoun County, Mississippi, did not attend the public schools of said Calhoun County, or if the children of any such teacher, if living outside of Calhoun County, did not attend public schools, said teacher would not be employed or re-employed.

Further answering affirmatively and in the alternative, Defendants would show that such policy is reasonable and significantly related to the job performance and effectiveness of a classroom teacher.

Further answering affirmatively and in the alternative, Defendants would show that such policy is im-

perative if the best interests of the children attending the public schools of Calhoun County, Mississippi are to be served.

Further answering affirmatively and in the alternative, Defendants would show that said policy is significantly related to obtaining the total support of the entire school system, both teachers, employees and students, in assisting the Superintendent of Education and the School Board of Calhoun County, Mississippi in implementing and carrying out the prior orders of this Court and in carrying out the spirit and intent of the decisions and rulings of the Supreme Court of the United States.

And now, Roger W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education, and Board of Education of Calhoun County, Mississippi, having fully answered the Complaint filed herein against them, respectfully pray that said Complaint and this cause be dismissed as to the Defendants at the cost of the Plaintiffs.

Answering Defendants pray for general relief.

Respectfully submitted,
ROGER W. HUDSON, individually and in his capacity as Principal of the Calhoun City Attendance Center; JOHN BURT, individually and in his capacity as Superintendent of the Calhoun County Board of Education; JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER and N. F. HANSON, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; PRINCIPAL OF CALHOUN CITY ATTENDANCE CENTER; SUPERINTENDENT OF THE CALHOUN COUNTY BOARD OF EDUCATION; and BOARD OF EDUCATION OF CALHOUN COUNTY, MISSISSIPPI, Defendants.
SUMNERS & HICKMAN
Attorneys at Law
Oxford, Mississippi
/s/ WILL A. HICKMAN
WILL A. HICKMAN
Attorneys for
Defendants

THE STATE OF MISSISSIPPI
THE COUNTY OF LAFAYETTE

Personally appeared before me, the undersigned authority in and for the State and County aforesaid, WILL A. HICKMAN, of Sumners & Hickman, Attorneys at Law, Oxford, Mississippi, who on oath states that he is one of the attorneys for the Defendants in the above and foregoing Amended Answer, duly authorized in the premises; that the matters and things positively stated in the foregoing Amended Answer are, of affiants own personal knowledge, true and correct as therein stated, and that those stated on information and belief are upon trustworthy information which affiant believes to be true, and that this verification is upon his personal knowledge or information as the case may be of the affiant.

/s/ WILL A. HICKMAN
WILL A. HICKMAN
Solicitor for Defendants

SWORN TO AND SUBSCRIBED before me, this the 5th day of September, 1973.

/s/ PATSY H. WALLER
Chancery Clerk

(SEAL)

[Certificate of Service Omitted in Printing]

[9] [Title Omitted in Printing]

MOTION TO RE-OPEN

Filed: Sep. 18, 1973

Comes now the Defendants in the above styled and numbered cause, by and through their counsel, and respectfully move the Court to re-open the subject cause for the purpose of receiving additional evidence bearing upon the status of the Calhoun Academy. Defendants would show unto the Court that at the trial of this cause, they were not in a position to fully develop the status of such, but said Defendants are now in such a position. Defendants would show that said additional evidence is relevant and essential to a just determination of this cause. Defendants further move that this cause be set for hearing to receive such additional evidence at such time and place as the Court may deem proper.

Respectfully submitted,
Robert W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warnar, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, and N. F. Hanson, individually and in their capacity

as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education; and Board of Education of Calhoun County, Mississippi, Defendants
SUMNERS & HICKMAN
Attorneys at Law
Oxford, Mississippi
/s/ WILL A. HICKMAN
WILL A. HICKMAN
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

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[10] UNITED STATES DISTRICT COURT
Northern District of Mississippi
Post Office Drawer 190
Greenville, Mississippi 38701

September 19, 1973

William C. Keady
Chief Judge

Honorable John B. Farese
Ashland, Mississippi 38603

Honorable Will Hickman
Oxford, Mississippi 38655

Re: Billy D. Cook v. Robert W. Hudson
No. WC 73-65-K

Gentlemen:

Judge Keady has reviewed the transcript containing possible issues suggested by the court for briefing by counsel and has concluded that they should be stated with more precision. In general, the Judge feels that the present case does not present First Amendment questions but does involve multiple aspects of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

1. Turning first to equal protection, is the school board's policy to be tested by the rational relation standard or by the compelling state interest standard? This is always a basic equal protection question.

2. Assuming the proper standard of judicial review (as posed in No. 1), is the board's announced policy constitutional to the extent that it precludes employment in the public schools of a teacher, otherwise qualified, who sends his or her children to a private school which is racially discriminatory as to admission of students, employment of faculty, or in other respects?

3. What is the constitutional effect of a school board policy which bars a person, otherwise qualified, from teaching in the public schools on the ground that the children of such person are sent to a private school of any character, that is, irrespective of whether the private school is racially nondiscriminatory, parochial or religious, or a special school for children who are mentally retarded, deaf, blind, or otherwise handicapped?

4. Turning next to due process, what, if any, type of notice, hearing, and consideration, before dismissal, must be given to a public school teacher who is also a parent and concludes that his or her children should be enrolled in a private school?

5. Assuming due process requires such hearing and the school board did not afford one, is the court in position to determine from evidence before it the due process rights of the parent-teachers who are plaintiffs in this case?

6. Assuming the board has authority to bar a person from teaching in the public schools who sends his or her own children to a racially discriminatory private school, does due process require the plaintiffs in suit be accorded a hearing before the school board or may this court, on the basis of the evidence before it, determine that the policy should be upheld as to their individual cases?

7. Since the children of the parent-teachers in suit are attending a private school known as Calhoun

Academy, is that school racially discriminatory or racially nondiscriminatory? Obviously, this is a question of fact. Should that question be determined initially by the school board, and, if so, has it been so determined by the school board? If not, should this court make such determination on the present record?

Briefs addressed to the above questions should be useful in the court's effort to come to grips with the novelty of this case.

Sincerely yours,
/s/ RAY MITCHELL
Ray Mitchell
Law Clerk to
Judge Keady

RM/fg
cc: Jacket File
Honorable Paul M. Moore

[Filed: Sep. 20, 1973]

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[11] [Title Omitted in Printing]

ORDER

Filed: Sep. 20, 1973

The court has before it the motion of defendants to reopen the cause for the submission of additional

evidence bearing upon the status of Calhoun Academy, and upon consideration thereof and concluding that the ends of justice would be best served by reopening the cause and allowing both sides to introduce such further evidence touching upon the issues in the case as they may see fit, taking into account the several legal issues raised by the court by communication addressed to counsel; it is

ORDERED

That the motion to reopen the cause for the purpose of receiving additional evidence be and the same is hereby sustained, with the right of both sides to offer such additional evidence as they may see fit so to do. Said cause is calendared for recessed hearing at Oxford, Mississippi, at 9 a.m. on Friday, October 12, 1973.

This, 19th day of September, 1973.

/s/ WILLIAM C. KEADY
Chief Judge
United States District Court

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[12] [Title Omitted in Printing]

CIVIL MINUTES — GENERAL

Filed: Oct. 15, 1973

Civil Minutes — General

Oxford, October 12, 1973, 9:00 — 11:00 AM

Present: Hon. William C. Keady, Judge; Mary S. Guyton, Deputy Clerk; Jerry L. Kelley, Court Reporter

Attorneys present for plaintiffs:
Hon. John B. Farese
Attorneys present for defendants:
Hon. Will A. Hickman, Hon. S. T. Rayborn

PROCEEDINGS: CASE REOPENED FOR ADDITIONAL PROOF

At the close of additional proof case taken under advisement and counsel will orally argue case Monday, October 15, 1973 in Oxford

Docket Entry: 10/12/73 — After hearing additional proof, case taken under advisement with oral arguments scheduled for 10/15/73 in Oxford at 11 A.M.

T. MARX HUFF, Clerk
/s/ MARY S. GUYTON
Deputy Clerk

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[13] [Title Omitted in Printing]

ORDER

Filed: Nov. 2, 1973

Order with Memorandum Opinion

Upon the call of this case, all parties appeared in court personally and by their attorneys and agreed to advance and consolidate the final hearing on the merits with the court's consideration of plaintiffs' application for preliminary injunction. Thereupon, the court received evidence, both oral and documentary, from all parties and memorandum briefs by counsel, and having maturely considered the matter, the court is of the opinion, for the reasons set forth in Memorandum Opinion this date released, that plaintiffs are not entitled to injunctive or other relief; it is

ORDERED

1. That plaintiffs' motion for preliminary injunction is hereby denied.

2. That the complaint is finally dismissed with prejudice.

All costs are taxed to plaintiffs.

This, 1st day of November, 1973.

/s/ WILLIAM C. KEADY
Chief Judge
United States District
Court

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

MEMORANDUM OPINION

Filed: Nov. 2, 1973

In this § 1983 case, the plaintiffs, Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, formerly employed as teachers at the Calhoun City Attendance Center, sue the Board of Education of Calhoun County, Mississippi, the County Superintendent of Education and the school principal for reinstatement, back pay and other relief. Claiming that they were unconstitutionally discharged, plaintiffs invoke federal court jurisdiction under 28 USC § 1343(3). The cause was initially set for hearing on plaintiffs' motion for preliminary injunction; however, the parties consenting thereto, trial of the action on the merits was advanced and consolidated with the preliminary hearing. Following the presentation of evidence at two separate hearings and submissions of briefs by counsel, the case is now ripe for final decision.

Certain background facts provide the setting for the present controversy. On August 9, 1968, this court entered an order terminating the dual school system previously existing in the public schools of Calhoun County which had proved to be ineffective under freedom of choice and directed immediate desegregation. By the order in *United States of America* v. *Calhoun County Board of Education*, No. WC 6637,

pupils in the first three grades were assigned to county schools in accordance with geographic zones for the 1968-69 school year; and pupils in grades 4, 5 and 6 were so assigned the next school year, 1969-70, coincident with the desegregation of the upper six grades subsequently ordered. Entering a standard *Singleton*-type decree with respect to faculty, staff, transportation and other services, activities and facilities, the court enjoined the board to take affirmative steps to eliminate racial discrimination from the public schools and to bring about a unitary school system within the county.

At the time of the court order, no private school, either religious or secular, had ever existed in Calhoun County. Within one month thereafter, local citizens formed the Calhoun Educational Foundation Corporation, organized to establish and operate Calhoun Academy, a secular private school which from its beginning has been attended by an all-white student body and served by an all-white faculty and staff.

When first established, Calhoun Academy was located about six miles south of Calhoun City, and originally provided the first three grades for elementary students who, except for desegregation, would have attended public school at Calhoun City. Subsequently, the school employed D. L. Harrison, former public school principal, as headmaster. The Academy has since moved to a new location north of Calhoun City; the school has added six more grades and enjoys significant support of certain citizens and local or-

ganizations, notably the local chapter of the Citizens Council, interested in maintaining a racially segregated education program. Calhoun Academy, because of its failure to adopt racially nondiscriminatory admission policies satisfactory to Internal Revenue Service, no longer has tax exempt status under § 501(c) (3) of the Internal Revenue Code,[1] nor has the school, though initially supplied with state-owned textbooks, qualified to continue receiving such textbooks pursuant to this court's order implementing the Supreme Court's decision in *Norwood v. Harrison*, ___ US ___, 37 L ed 2d 723 (1973). It is inescapably clear that Calhoun Academy is a racially discriminatory institution formed in the wake of public school desegregation to provide a haven for segregated education.

In November 1972 the school board, acting upon the recommendation of its attorney, the superintendent and other school officials, verbally adopted a policy which, though never reduced to writing, is agreed to provide as follows: "Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun City, Mississippi, would be required to attend the public schools of said Calhoun County, or said teachers

1 *Green v. Connally*, 330 F. Supp. 1150 (D. C. D. C. 1971, 3-judge), aff'd sub nom *Coit v. Green*, 404 US 997 (1971); and affidavit filed therein of Commissioner of Internal Revenue on September 30, 1970, revoking advanced assurance of deductibility as to 9 private schools, including Calhoun Academy; Internal Revenue Bulletin No. 1971-12 dated March 22, 1971; letter dated July 3, 1973, from District Director of Internal Revenue to W. A. Matthews, Mississippi Text Book Purchasing Board.

would not be employed or reemployed." The evidence establishes that although stated in general terms, the policy was adopted only with Calhoun Academy in mind, as that institution still remained the only private school within a county where parochial or religious schools had never existed.

In November 1972, the children of 8 public school teachers were enrolled in the Academy; and its student body was wholly composed of white children residing in the county. Although informally adopted, the board's policy was nevertheless made known to the teaching staff without delay; it was freely discussed among the teachers who understood it would become effective at the beginning of the next school year. The board did not expressly provide that any teacher affected by its policy would be granted a hearing; and no teacher, including the plaintiffs, ever requested a hearing, or was refused one by the board.

When new teacher contracts were being made in April-May 1973, Roger W. Hudson,* principal of the Calhoun City Attendance Center, refused to recommend the plaintiffs for teaching positions on his faculty. The sole reason for refusal was that the plaintiffs, otherwise qualified to continue their teaching duties, stated that they could not comply with the board's policy, and concededly they have not done so. It is undisputed that plaintiffs were informed that the failure to comply with the board's policy would preclude their reemployment, but plaintiffs, unlike

* Erroneously sued as Robert W. Hudson.

some other teachers in the system, elected not to comply and preferred to send, or continue sending, their children to Calhoun Academy. Each plaintiff testified at the hearing.

Billy D. Cook, a high school teacher with 5 years' experience in the Calhoun public schools, enrolled his two children, ages 7 and 5, in the private academy, in a belief that it provided "a calmer environment" for them and insured against his showing them "natural partiality of a parent" while attending public school. Ms. Adams, who had taught two years at the Calhoun City Attendance Center, enrolled her two small children in the private school, deeming them to be better off in "a calmer situation" where they would receive more individual attention and be exposed to daily devotions, including the reading of Bible stories. One of Ms. Adams' children had a speech defect or difficulty which she stated influenced her decision although a speech therapist was employed at the public school but not at the private academy. Ms. Adams, like Mr. Cook, was a Baptist and conceded that the Academy was a secular and not a religious school. Ms. Wright, a Methodist, had taught six years as a home economics teacher in the Calhoun County public schools. Her two children, ages 10 and 7, had attended the private school for several years when the board's policy was announced. Her reasons for so enrolling them were of a similar nature, as she preferred for her children the smaller class groupings and exposure to Bible studies and devotional exercises. Moreover, Ms. Wright found that the Academy was of greater convenience for her children to attend than the public school since it was

within walking distance of the family residence. Ms. Wright had withdrawn her older child from the public school the first year of desegregation, had devoted considerable time to promoting the private school, and acknowledged that she was not totally committed to a desegregated public school system. Each plaintiff's testimony was, on cross-examination, substantially impeached as to the underlying cause for the decision to patronize the private school. The court concludes, as a fact, that the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system.

Plaintiffs challenge the constitutionality of the board's policy on several alternative grounds, which may be summarized as follows: (1) The policy violates First Amendment rights they have as parents to send their children to a school of their choice in the exercise of freedom of association and freedom of religion; (2) The policy, applicable on its face to all private schools of every description, is both impermissively broad and indiscriminate and also an unreasonable and arbitrary classification, thus offending the Equal Protection and Due Process Clauses of the Fourteenth Amendment; and (3) The policy further contravenes the procedural due process rights safeguarded by the Fourteenth Amendment since it failed to provide plaintiffs with a hearing before the school board and a reasonable opportunity to present their individual grounds for not complying with the blanket policy before being terminated as teachers in the public school system.

Defendants, denying the foregoing contentions, claim that plaintiffs have no viable First Amendment rights in expecting or seeking continued employment in the public schools of Calhoun County, that the board's policy, as applied to plaintiffs whose children attend a racially discriminatory private school, is a reasonable regulation by any standard of equal protection review, and finally, that plaintiffs, being non-tenured teachers without more than an expectancy of re-employment, had no due process rights to a hearing prior to not being offered new contracts of employment, or, if such right did exist, their claims in this regard are now properly before the court for determination after full hearing, and plaintiffs have failed to show substantial grounds for exemption under the board's policy.

While the board's policy may be novel and one not heretofore judicially ruled upon, we are of the opinion that the case is controlled by familiar principles of constitutional law and the policy should be upheld as applied to the facts of this particular case. No relief can be granted to the plaintiffs.

Plaintiffs rely, primarily, upon the constitutional right as parents to send their children to the school of their choice, in accordance with the First Amendment "freedom of association" right vouchsafed to them by *Griswold v. Connecticut*, 381 US 479, 14 L ed 2d 510 (1965); *NAACP v. Alabama*, 357 US 449, 2 L ed 2d 1488 (1958); and *Pierce v. Society of Sisters*, 268 US 510, 69 L ed 1070 (1925), and assert that under *Pickering v. Board of Education*, 391 US 563, 20 L ed 2d 811 (1968),

they cannot be required to forfeit these First Amendment privacy rights as a condition of further public school employment. The Supreme Court cases upon which plaintiffs rely are, in our view, both factually and legally distinguishable and do not sustain them in the present factual setting. Conceding there must be clear justification for curtailing or limiting First Amendment rights, nevertheless, plaintiffs' rights as parents may not be considered in isolation, and to the exclusion of other constitutional demands of equal, if not greater, magnitude. "As no constitutional guaranty enjoys preference, so none should suffer subordination or deletion." *Ullmann v. U. S.*, 350 US 422, 100 L ed 511 (1956). The instant case, at first blush, may appear to present a choice between competing values that might be urged under the First Amendment and what is done in fulfillment of the Fourteenth Amendment. As *Pickering* makes clear, courts must "arrive at a balance between the interest of a teacher, as a citizen [in the exercise of First Amendment rights], and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." 391 US at 568. Thus, First Amendment rights must be applied "in the light of the special characteristics of the environment of the particular case", *Clark v. Holmes*, 474 F. 2d 928, 931 (7 Cir. 1972); *Tinker v. Des Moines Independent School District*, 393 US 503, 506, 21 L ed 2d 731 (1969); and where the exercise of First Amendment rights impairs the teacher's effectiveness, or conflicts with the performance of his job, the school board may lawfully refuse to rehire the teacher. Cf. *Cole v. Choctaw*

County Board of Education, 471 F. 2d 777 (5 Cir. 1973). The Supreme Court succinctly stated in *Adler v. Board of Education*, 342 US 485, 492, 96 L ed 517, 524 (1952):

> "[Teachers] have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

It necessarily follows that if the board's policy is a reasonable and constitutional regulation, plaintiffs may not complain of the consequence of not being rehired as public school teachers for having exercised their right to send their children to a private school.

The validity of the board's policy presents a more serious issue since it applies, literally, to all private schools of every description and regardless of particular circumstances that might motivate parental desire for private, and not public, schooling. Yet the undisputed proof shows that the school board, the plaintiffs and the local community understood that the regulation was adopted, and has been applied, only as to public school teachers who patronize the racially discriminatory private school at Calhoun City. We express no opinion as to whether the policy might validly extend to teachers sending their children to schools which do not foster racial discrimination but are

specially designed for physically handicapped or mentally retarded children or offer other specialized training not in general competition with the public school system. Since private schools of that nature are not attended by plaintiffs' children, they cut no figure in this case. We, therefore, construe the policy in the limited terms intended by the board and applied to the plaintiffs.

The board's policy passes muster under the Equal Protection Clause of the Fourteenth Amendment if it satisfies the rational relation standard, which is the test ordinarily applicable to cases that involve the non-reemployment or dismissal of public school teachers. *Cole v. Choctaw County Board of Education*, supra; *Fisher v. Snyder*, 476 F. 2d 375 (8 Cir. 1973); *McEnteggart v. Cataldo*, 451 F. 2d 1109 (1 Cir. 1971), cert. denied, 408 US 943, 33 L ed 2d 767 (1972); *Drown v. Portsmouth School District*, 451 F. 2d 1106 (1 Cir. 1971). By this standard, a regulation is invalid as a denial of equal protection of the law only if it is without some reasonable basis and is palpably arbitrary; the regulation will be upheld so long as a state of facts reasonably can be conceived to support it. In our view, the board had ample justification to adopt its rule.

According to the weight of the evidence, the board was persuaded that the challenged rule was needed to eliminate racial discrimination from the public schools. Public school desegregation in Calhoun County was a controversial policy which caused a division in the community; many citizens imme-

diately threw their support to continuing racial segregation in a private school to operate in competition with the public schools. Since white flight may present a serious obstacle to effective desegregation, a school board is empowered to adopt appropriate measures in aid of the schools under its charge. Defendants, without dispute, acted with no purpose or motive other than to strengthen local support for the public schools by requiring its teachers to give their undivided loyalty to the unitary school system and forego allegiance as patrons of schools practicing racial discrimination. A requirement of this kind, instead of being arbitrary and irrational, is based upon logic that is readily discernible. Defendants' experts in the field of educational psychology expressed the view, which we accept, that the challenged policy was significantly related to a teacher's effectiveness and job performance: students in desegregated classes are likely to perceive rejection, and experience a sense of inferiority, from a teacher whose own children attend a nearby racially segregated school, and be inclined to perform at a lower educational level. Indeed, the Supreme Court itself has documented a finding that: "A sense of inferiority affects the motivation of a child to learn." *Brown v. Board of Education*, 347 US 483, 494, 98 L ed 873, 880. Moreover, the Supreme Court, in *Norwood*, spoke of racially discriminatory private schools in these words:

> "Under Brown v. Board of Education, supra, discriminatory treatment exerts a pervasive influence on the entire educational process.

> The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education." 37 L ed 2d 733.

Thus, an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools. Actions speak louder than words, to students no less than to adults. We hold that the board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools.

Finally, we consider plaintiffs' claim that the board's failure to provide them with a hearing prior to termination violated their procedural due process rights. Mississippi, of course, does not have a tenure system for public school teachers, and plaintiffs have failed to show the existence of any rules or understandings with defendants whereby they would be continued in employment beyond the period of their teaching contracts. Plaintiffs held one-year contracts which expired at the end of the 1972-73 school year; they were not discharged during the school year. Although all of the plaintiffs had been employed in the

Calhoun County school system for several preceding years, none had more than a "subjective expectancy" of reemployment generated by prior periods of employment. Under these circumstances, it is settled law that a hearing was not necessary. *Perry v. Sindermann*, 408 US 593, 33 L ed 2d 570 (1972); *Skidmore v. Shamrock Independent School District*, 464 F. 2d 605 (5 Cir. 1972); *Moore v. Knowles*, 466 F. 2d 531 (5 Cir. 1972). In *Skidmore*, the court upheld the non-retention, without a board hearing or statement of reasons, of a teacher who had been employed for twenty-two consecutive one-year terms. In a Mississippi case, *Thompson v. Madison County Board of Education*, 476 F. 2d 676, 679, the Fifth Circuit emphasized that at the *end* of a school year, a school board "can refuse to rehire a non-tenured teacher with no expectation of reemployment without any reason at all." In the instant case, however, plaintiffs were plainly advised of the reason for their nonretention and had every opportunity to seek a hearing before the board if they desired one. Indeed, the burden was incumbent upon them to initiate review proceedings, and to demonstrate that the board's failure to rehire was a violation of constitutionally protected interests. *Skidmor*, supra.

Assuming, however, that plaintiffs were entitled to a due process hearing, they have been accorded a full hearing in this court, and they have had opportunity to present evidence in support of their claims. In the light of the facts heretofore found, the court holds that the board's failure to rehire the plaintiffs was a lawful

act and did not constitute a violation of any constitutional rights held by plaintiffs.

Let an order dismissing the complaint with prejudice be entered.

This, 1st day of November, 1973.

/s/ WILLIAM C. KEADY
Chief Judge
United States District
Court

[Certificate of Service Omitted in Printing]

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[14] [Title Omitted in Printing]

NOTICE OF APPEAL

Filed: Nov. 26, 1973

NOTICE is hereby given that Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, Plaintiffs, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final order of the United States District Court for Northern District of Mississippi, Western Division, overruling Plaintiffs' Motion for Preliminary Injunction and dismissing Complaint with prejudice entered in this action on the 1st day of November, 1973.

FARESE, FARESE,
JONES & FARESE
P.O. Box 98
ASHLAND, MISSISSIPPI 38603
/s/ JOHN B. FARESE
JOHN B. FARESE
ATTORNEY FOR
PLAINTIFFS

[Certificate of Service Omitted in Printing]

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[15] [Title Omitted in Printing]

BOND FOR COSTS ON APPEAL

Filed: Nov. 26, 1973

KNOW ALL MEN BY THESE PRESENTS:

That we, Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, and United States Fidelity and Guaranty Company, as Surety, are held and firmly bound unto Robert W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; Principal of Calhoun City Attendance Cen-

ter; Superintendent of the Calhoun County Board of Education; and Board of Education of Calhoun County, Mississippi, in the full and just sum of Two Hundred Fifty and no/100 ($250.00) Dollars to be paid to the said Robert W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education; and Board of Education of Calhoun County, Mississippi, their successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of November, 1973.

WHEREAS on November 1, 1973, in an action pending in the United States District Court for the Northern District of Mississippi, Western Division, between Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, as Plaintiffs, and Robert W. Hudson, individually and in his capacity as Principal of the Calhoun City Attendance Center; John Burt, individually and in his capacity as Superintendent of

the Calhoun County Board of Education; James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher and N. F. Hanson, individually and in their capacity as members of the Board of Education of Calhoun County, Mississippi and as the Board of Education of Calhoun County, Mississippi; Principal of Calhoun City Attendance Center; Superintendent of the Calhoun County Board of Education; and Board of Education of Calhoun County, Mississippi, as defendants, a judgment was rendered against the said Plaintiffs, and the Plaintiffs having filed a notice of appeal from such judgment to the United States Court of Appeals for the Fifth Circuit;

NOW, THEREFORE, the condition of this obligation is such, that if the said Plaintiffs shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed, on the judgment affirmed, and such costs as the said Court of Appeals may award against the said Plaintiffs if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

WITNESS our hands and seals, this 21 day of November, 1973.

BILLY D. COOK
LOULA JUANITA MILTON
AND
MRS. W. P. WRIGHT

/s/ JOHN B. FARESE
John B. Farese
Farese, Farese,
Jones & Farese
PRINCIPAL
UNITED STATES FIDELITY &
GUARANTY COMPANY
/s/ ROBERT E. CARRINGTON, III
Attorney in Fact
SURETY
(SEAL)

STATE OF MISSISSIPPI
COUNTY OF BENTON

Personally appeared before me, the undersigned authority in and for the County and State aforesaid the within named John B. Farese, who acknowledged that he signed, executed and delivered the foregoing Bond for Costs on Appeal on the day and year therein mentioned as and for his own free act and deed.

Given under my hand and seal, this the 21st day of November, 1973.

/s/ MARY ELLEN ROBERTS
NOTARY PUBLIC

(SEAL)

[Certificate of Service Omitted in Printing]

DEFENDANT'S EXHIBIT NO. 1

Big crowd at Academy supper

About 250 people attended the barbecue supper at Calhoun Academy Saturday night.

Jim Buck Ross, State Commissioner of Agriculture, spoke to a packed house and had the crowd rolling with laughter after only a few words.

He recounted several tales about bird and coon dogs, and told some of his experiences on the political trail.

He said he believes the state is on the move. Ross told the crowd, "The cotton crop is good, soybeans are good, most crops are good, the hogs are selling good, cattle is good, catfish is good, everything is good this year. Now all we need is more coolidges for farmers".

He said he is proud to be associated with rural Mississippi. Ross told the audience that he hopes we will always have a rural Mississippi, "where the air is clean, where boys and girls grow up learning to say, 'Yes, sir' and 'Yes, ma'am' where the family unit is emphasized, religion and love of freedom and this country, where the people are patriotic, and honesty and hard working people are respected. I'm glad to be living among people who have good moral principles and good common sense".

Ross was introduced by Academy headmaster D. L. Harrison, who said of Ross, "Jim Buck Ross is a real public servant. His list of accomplishments in the field of agriculture alone would fill a book. He is one of the outstanding men of our state."

Democratic Congressional nominee David Bowen also attended the supper and made a brief speech.

Also in hand was State Senator Chester Butler of Byram, who got off a few quips that brought laughter from the group.

The Calhoun County Citizens Council sponsored the event and provided the Academy with a check for $250.00.

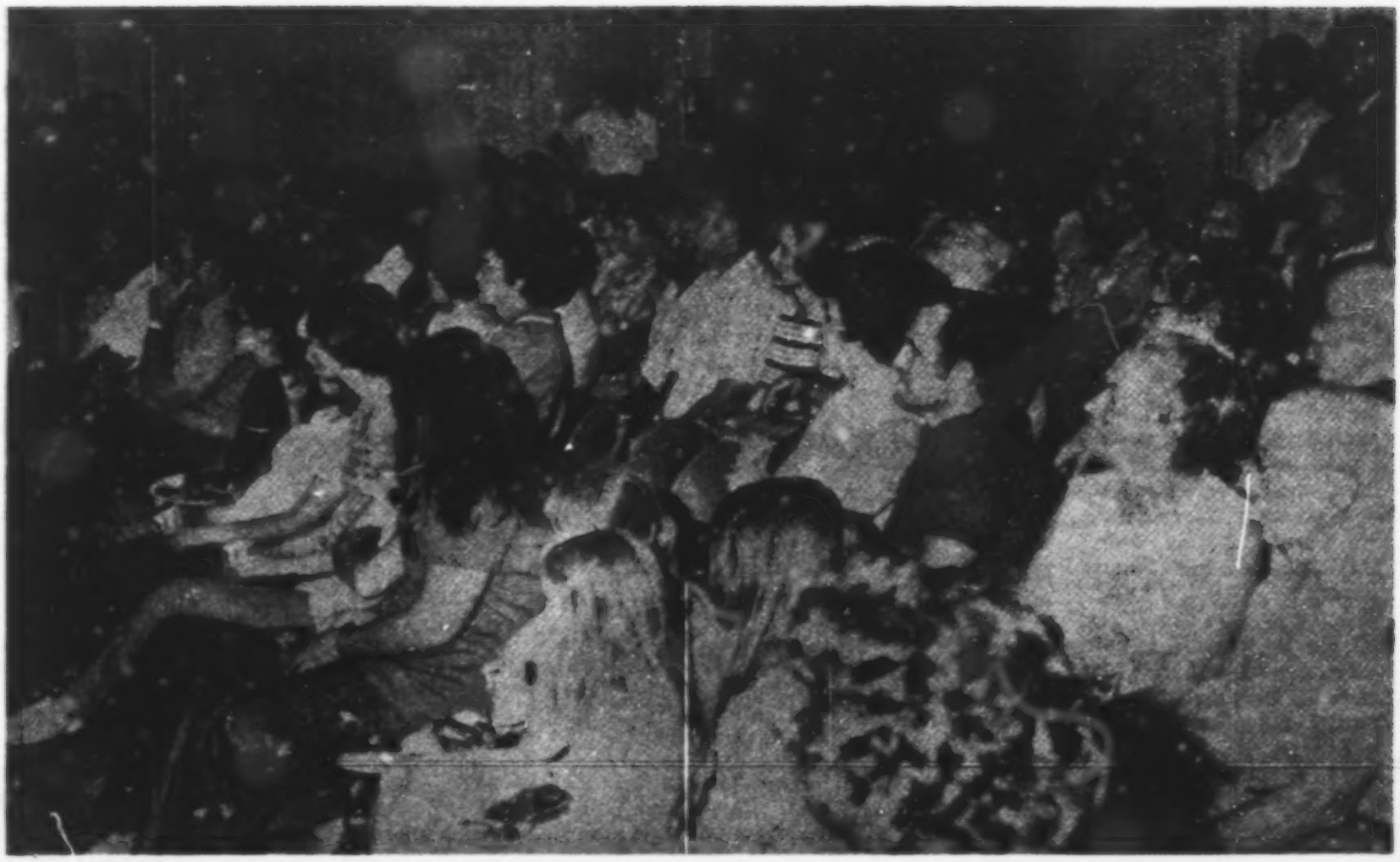
Ag. Commissioner Ross speaks here

Jim Buck Ross, State Commissioner of Agriculture, spoke before a packed house at the barbecue supper at Calhoun Academy Saturday night. More pictures on page 8.

Calhoun Academy gets check for $700

Ellis Denton (left) of Sehoagia community, vice-president of Calhoun County Citizens Council, presents a check for $700 to Mrs. Parrett of Bruce, member of Calhoun Academy Board of Trustees. The check is for the amount of proceeds taken in at the barbecue supper sponsored by the Council Saturday night.

Scenes at barbecue supper at Academy



BIG CROWD ATTENDS the barbecue supper at the Academy Saturday night.

"SOUTHERN SONS" of Pantotoc County played to an appreciative audience.

LINDA CARROLL, country music singer from Veiden, signs autographs for Sonya McCoy and Angela Evans, Jackson

BARBECUEING THAT GOOD MISSISSIPPI CHICKEN from the State Dept. of Agriculture were (from left) Avery Rowland, C. M. Ueltschey, Paul Jones, Herman Kennedy and Jay Garrett. Commissioner Ross feels that each agricultural item produced in this state is entitled to all the promotional activities that the Agriculture Dept. can deliver and this is the reason why they prepare the chickens.

...proceeds from ... country music show held Saturday night, sponsored by ... County Citizens Council. Shown here are (from left) E. ..., president of the local Council, Earl Wayne Armstrong, member of the Academy Trustee's Club; and ... Love, membership chairman of the Council. All of the ... donated their time for the event.

School suit is Thursday

The damage suit filed by Cook, Wright and Adams against Roger Hudson, John Burt and the County School Board will be heard Thursday, Sept. 13, at 9:30 a.m. in the federal building in Aberdeen.

Judge Keady will preside.

According to unconfirmed reports, the defendants allege that they fired two teachers because they had their children in the private school, but this was done in order to further implement the integration of the schools, under the court orders.

DEFENDANT'S EXHIBIT NO. 2

To: Heads of Private Schools

From: Mississippi State Textbook Purchasing Board

Date: July 26, 1974

Gentlemen:

Late yesterday afternoon on July 25, Judge William C. Keady signed an order regulating the issuance of textbooks to private schools. That order and supporting questionnaire are enclosed.

As you will note the order requires that the submission of applicant school must be postmarked by August 10, 1973. After proper submission this Board will make decisions on eligibility by September 10, 1973. There are, of course, provisions for judicial review and certification. For those schools which are declared ineligible there is a sixty day grace period so that schools may ascertain what books they will buy and so that adequate inventories of books may be built by local textbook firms.

Those schools which do not apply under the new standards will, under the order, be ineligible for state textbooks for the current 1973-74 school year.

/s/ W. A. MATTHEWS
W. A. Matthews
Executive Secretary

/s/ HEBER LADNER, JR.
Heber Ladner, Jr.
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DELORES NORWOOD, ET AL,
Plaintiffs

versus NO. WC 70-53-K

D. L. HARRISON, SR., ET AL,
Defendants

ORDER

The Supreme Court of the United States having vacated our prior judgment and remanded the case for further proceedings consistent with its opinion that a certification procedure, subject to judicial review, be established to screen private school requests for state-owned textbooks, (*Norwood v. Harrison*, 41 LW 5094);

and the three-judge district court having been dissolved by order of July 9, 1973; and the court having considered the proposed certification procedures advanced by the parties and arguments in support thereof; it is

ORDERED

1. Defendants, their agents and representatives, are permanently enjoined from distributing or otherwise making available state-owned textbooks to any private school in Mississippi which engages in discrimination of any kind or character based upon race, creed, color, or national origin. No private school may receive books if it is not open at all times to students on an equal, nondiscriminatory, basis.

2. Any private school which fails to qualify for state-owned textbooks under ¶ 1 above shall return to state depositories all such textbooks in its charge, in accordance with the procedures hereinafter stated.

3. Defendants shall forthwith implement the following certification procedure to assist them, and ultimately the court, in determining whether any private school is eligible to receive state-owned textbooks in accordance with Constitutional requirements:

A. Prior to any further shipment of textbooks, defendants shall send to each private school in the State, presently holding and/or requesting state text-

books, a copy of this order and a "Certification and Background Information" form which shall conform to "Exhibit A" attached hereto.

B. Concurrently with the mailing of such form, defendants shall request of each such private school that it complete, under oath of an authorized representative of such school, the "Certification and Background Information" form and return it to the Textbook Purchasing Board within 15 days, or not later than August 10, 1973; and defendants shall advise each private school that the failure to file completed "Certification and Background Information" form will render it ineligible to receive state-owned textbooks for the school year 1973-74.

C. As soon as practicable, but no later than September 10, 1973, defendants shall determine the eligibility of private schools to receive state-owned textbooks for use by its students.

D. Defendants shall notify each private school of its decision as to eligibility or ineligibility and shall concurrently file with the clerk of this court and serve upon counsel for plaintiffs a copy of its decision and of the Certification and Background Information form and any other supporting evidence. Within 15 days after receipt thereof, any party aggrieved by the final administrative decision of the defendants may seek judicial review by filing in this court objections to the certification of eligibility or denial thereof. The court will thereafter set the matter for adversary hearing at

the earliest practicable time upon notice to all persons interested in any such appeal.

4. Due to the special exigencies of the case, the court will allow to all schools certified by the defendants to be ineligible a grace period of 60 days, expiring at all events no later than November 12, 1973, for the surrender and delivery to the County Superintendent of Education situated in the county of the location of such ineligible private school all state-owned textbooks in current inventory in its possession or in the custody of the students enrolled at such school. At the time of such redelivery, the school's administrative head must give notice thereof to the State Textbook Purchasing Board and to the clerk of this court. Notwithstanding the foregoing, any private school which may challenge the decision of ineligibility by the defendants and which has filed an appeal in this court in the manner hereinabove provided may apply to this court and seek an extension of the delivery date after showing good cause therefor.

5. It is further ordered that pending the completion of the certification procedures above outlined, all private schools in Mississippi operated by organizations declared by the United States Internal Revenue Service exempt from federal income taxes may receive further shipments of textbooks. Defendants shall require reasonable proof from Internal Revenue Service as to such organizations operating schools which qualify for the foregoing tax exempt status.

The court retains continuing jurisdiction of this cause for the purpose of issuing such further and supplemental orders as may be necessary to effectuate the intent of the foregoing and to carry out the mandate of the United States Supreme Court.

This, 25th day of July, 1973.

/s/ WILLIAM C. KEADY
Chief Judge
United States District Court

EXHIBIT "A"

MISSISSIPPI TEXTBOOK PURCHASING BOARD CERTIFICATION AND BACKGROUND INFORMATION FORM

1. NAME OF PRIVATE SCHOOL: _____
2. ADDRESS (include county): _____
3. NAME AND TITLE OF OFFICIAL COMPLETING FORM: _____
4. GRADES PRESENTLY SERVED BY SCHOOL: _____
5. DATE PRIVATE SCHOOL OPENED FOR THE FIRST TIME AND GRADES SERVED UPON OPENING: _____

6. DATE ADDITIONAL GRADES WERE ADDED (if any): _____

7. ENROLLMENT AND FACULTY BY RACE:

	Students		*Professional Staff*	
	White	*Black*	*White*	*Black*
Upon Opening	—	—	—	—
September 1969	—	—	—	—
February 1970	—	—	—	—
September 1970	—	—	—	—
February 1971	—	—	—	—
September 1971	—	—	—	—
September 1972	—	—	—	—
September 1973 (projected)	—	—	—	—

8a. STATE WHETHER STUDENTS ATTENDING SCHOOL ARE IDENTIFIED BY RELIGION BY SCHOOL RECORDS: ____

_____

b. If yes, state the religion catered to by the school: _____

c. If yes, state the number of students, by religion, enrolled in the school in September 1972: _____

d. If yes, state the number of faculty members, by religion, employed by the school in September 1972: _____

9. IS THE SCHOOL PRESENTLY RECOGNIZED AS EXEMPT FROM FEDERAL INCOME TAXES ?
YES ___ NO ___

If yes, state the date on which said exemption was approved or granted: _____

10. DOES THE SCHOOL MAINTAIN EDUCATIONAL STANDARDS ESTABLISHED BY THE STATE DEPARTMENT OF EDUCATION? _____

11. ARE SCHOLARSHIPS (ACADEMIC OR ATHLETIC) AVAILABLE AT YOUR SCHOOL? _____

If yes, state the number of such scholarships offered during the 1972-73 school year to: a) white students _____; and b) black students _____.

12. ARE SCHOLARSHIPS AWARDED BY PRIVATE INDIVIDUALS TO STUDENTS OF YOUR SCHOOL? YES _____ NO _____

If yes, state the number of students by race who obtained such scholarship assistance during the 1972-73 school year: a) black students ____; and b) white students ____

13. HAS ANY TUITION DUE THE SCHOOL BEEN WAIVED? _____

If yes, then state the number of students, by race, granted such waiver during the 1972-73 school year: a) white students ____; and b) black students _____

14. ARE ANY BLACK STUDENTS ENROLLED AT YOUR SCHOOL MEMBERS OF ANY ATHLETIC TEAM(S) SPONSORED BY YOUR SCHOOL? _____

If yes, state the number of such students for the 1972-73 school year _____

15a. DOES THE SCHOOL HAVE A WRITTEN AFFIRMATIVE POLICY OF ADMITTING STUDENTS IRRESPECTIVE OF RACE?

_____

If yes, attach a copy of that policy and state the date of its adoption by the governing board of the school. _____

b. Has the school publicized this policy in a manner that is intended to and has been reasonably effective in bringing it to the attention of persons of student age (and their families) who are of minority groups, including all nonwhites? ____. If yes, attach copies of all notices in all newspapers, brochures, catalogues or printed advertisements appearing or prepared at the time the school was first opened and during the past school year.

c. Has any member of the school's governing board, administrators or faculty taken any action or made any statement qualifying or negating the school's stated policy of open admissions? _____

16. STATE THE NAMES AND ADDRESSES AND RACE OF THE SCHOOL'S:

a) Incorporators:

_____

_____

b) Founders:

_____

_____

c) Board Members:

_____

_____

17. STATE THE NAMES OF INDIVIDUALS, CORPORATIONS OR ORGANIZATIONS WHO (WHICH) HAVE CONTRIBUTED LAND OR BUILDINGS TO THE SCHOOL:

_____

_____

18. STATE WHETHER ANY INDIVIDUAL, CORPORATION OR ORGANIZATION LISTED IN ANSWER TO 16 and 17 HAS ATTEMPTED TO INFLUENCE THE SCHOOL TO MAINTAIN RACIALLY SEGREGATED EDUCATIONAL PROGRAMS. _____

If yes, state the names of such individual, corporation or organization. _____

19. STATE WHETHER ANY BOARD MEMBER, OFFICER OR ADMINISTRATOR OF THE SCHOOL IS PRESENTLY A MEMBER OF ANY ORGANIZATION ESPOUSING OR AD-

VOCATING WHITE RACIAL SUPREMACY OR SUPERIORITY. _____

If yes, list such individual:

_____

I hereby swear (or affirm), under penalties of perjury, that the foregoing information is true and accurate to the best of my knowledge, information and belief. I further understand that this affidavit is executed as a condition for supplying Mississippi State-owned textbooks to the above named private school, and that full and accurate answers are required by order of the United States District Court for the Northern District of Mississippi dated July 25, 1973, in civil action No. WC 70-53-K, styled Norwood, et al. v. Harrison, et al. on the docket of the court.

This, _____ day of _____, 197 ____.

_____

Title: _____

Sworn and subscribed to before me this ____ day of _____, 197 ____.

_____

(Name of School)

_____

Notary Public

My Commission Expires:

_____

(SEAL)

DEFENDANT'S EXHIBIT NO. 2

VITA

FRANCIS JOSEPH EICKE **74-1038**

PERMANENT ADDRESS	PRESENT ADDRESS
3160 Dauphine Street New Orleans, Louisiana 70117 (504) 949-7713	321 Ridgewood Manor Drive Oxford, Mississippi 38655 (601) 234-9476

PERSONAL — Married — 5'11" — 210 pounds — 33 years old

EDUCATIONAL BACKGROUND — Dartmouth College, A.B., 1961, History and Education
Tulane University, M.Ed., 1968, Guidance and Counseling
University of Alabama, Ed.D., 1971, Counseling and Guidance and Educational Psychology

EXPERIENCE

1961 to 1963 — Administrative Officer, 3321 Field Training Squadron, Amarillo Air Force Base, Texas. Supervised administration for a squadron of 1500 officers and men located at 100 bases around the world. Additional Duties: editor of squadron newsletter, inspection team member on detachment visits, reenlistment officer, liaison to base commanders.

1963 to 1965 — Postal Officer, 11 Air Postal Squadron, Thailand. Responsible for administration and supervision of postal service to all military forces in Thailand. Interim commander for three month period during the absence of a senior officer. Supervised both Air Force and Army personnel.

1965 to 1968 — Social Studies Teacher and Counselor, Chalmette High School, Chalmette, Louisiana. Principal: Mr. Raymond Kent. Taught courses at grade levels 9, 10, 11, and 12 during tenure. Parttime counselor. Adviser to Key Club and Student Council. Delegate to Louisiana Teachers Association Convention.

1968 — Assistant To Activities Coordinator, Student Development Office, University of Alabama. Advised fraternities and male organizations. Devised criteria for award of the President's Trophy to the outstanding fraternity.

1968 to 1971 — Graduate Assistant, Department of Counseling and Guidance, University of Alabama. Screened applicants for three EPDA programs. Evaluated and wrote technical reports for EPDA programs. Conducted special seminars for institute members. Taught graduate level Principles of Guidance classes each semester, Spring 1970 through Spring 1971.

Summer 1971	Visiting Assistant Professor, Department of Guidance and Educational Psychology, University of Mississippi. Taught courses in individual mental testing, elementary school counseling, and practicum in counseling.
1971 to 1972	Assistant Professor, Department of Education and Psychology, Florence State University. Taught courses in professional component of guidance and counseling graduate program, including Techniques of Counseling and Student Personnel Services in Higher Education, Group Guidance, Psychological Testing and Counseling the Disadvantaged. Taught undergraduate psychology and teacher education courses including a two-semester psychological assessment course, child and adolescent psychology courses.
1972 to present	Assistant Professor, Department of Guidance and Educational Psychology, University of Mississippi. Teach courses in guidance and educational psychology, with particular emphasis in vocational and testing areas. Supervise graduate teaching assistants instructing undergraduate courses.
DISSERTATION	A Study of the Effect of Communication Training on the Level of Emphatic Understanding and Facilitation of Counselors.
CONSULTATION	Title IV Project, West Alabama Region, Fall 1969. Project included crossover teachers on newly integrated faculties. Title IV Project, West Alabama Region, Spring 1971. In-service training of counselors in facilitative communication. Northwest Alabama Rehabilitation Center, Muscle Shoals, 1972. Consultant for evaluation of rehabilitation clients.
EVALUATIONS	Title IV Projects in Monroe County, Alabama (1969-70), West Alabama Region (1969-71), Northwest Alabama (1970-71) and Central Alabama Region (1970-71). Evaluator: Dr. Carl E. Cecil, Department of Educational Psychology, University of Alabama.

PROFESSIONAL ORGANIZATIONS

AMERICAN PERSONNEL AND GUIDANCE ASSOCIATION
(National, Dviisional, and State Levels)

AMERICAN EDUCATIONAL RESEARCH ASSOCIATION

PHI DELTA KAPPA

KAPPA DELTA PI

PROFESSIONAL REFERENCES

DR.GRADY E. HARLAN, Professor and Chairman, Department of Guidance and Educational Psychology, University of Mississippi, Unive.sity, Mississippi 38677.

DR. WILLIAM L. CROCKER, Chairman, Department of Education and Psychology, Florence State University, Florence, Alabama 35630.

DR. ROBERT E. GRIFFIN, Associate Professor, Department of Counseling and Guidance, University of Alabama, University, Alabama 35486 (Major Professor)

DR. RALPH M. ROBERTS, Professor and Chairman, Department of Counseling and Guidance, University of Alabama, University, Alabama 35486.

Taught — Child Psychology
Adolescent Psychology
Educational Psychology (graduate and undergraduate)
Measurement and evaluation in education (4 courses in this area)
Counseling courses
Theories of counseling
practicum
group guidance

Consultant, Mississippi Vocational Rehabilitation Department, Northern Region
Consultant, Early Childhood Education Center New Albany, MS.

DEFENDANT'S EXHIBIT NO. 3

To: Heads of Private Schools

From: W. A. Matthews, Executive Secretary
Miss. State Textbook Purchasing Board

Date: July 30, 1973

You are hereby requested to use the following procedure if you wish to discontinue the use of textbooks loaned by the State of Mississippi.

1. Make four copies (Inventory Report, Revised July 1, 1971) of the books you are returning to the state depositories.

2. Take the books to the County Superintendent of Education in your county.

3. Check in the books with the Superintendent's office and then, if in agreement, sign the four forms (headmaster signs on the line "Principal or Superintendent" and County Superintendent signs on the second line).

4. After this the Superintendent will give you two copies — one for your files and one to be sent to the Clerk of the Court (T. Marx Huff, P. O. Box 190, Oxford, Miss., 38655). This should be accompanied by a letter certifying that all state textbooks have been returned to the State.

5. The Superintendent will keep two copies — one for his files and one to be sent to the Textbook Board where the books turned in will be checked

by the 1973 inventory on file. If no inventory is available, it will be checked against previous inventories and sales.

The timetable of events according to Judge Keady's order is:

1. August 10, 1973 — deadline for completion of the "Certification and Background Information" form to be returned to the Textbook Board, P. O. Box 1075, Jackson 39205.

2. September 10, 1973 — deadline for determination of eligibility by the Textbook Board.

3. November 12, 1973, deadline for returning state loaned textbooks to the County depositories if ineligible.

Also be reminded that procedures are allowed in the court order for extension of time on these deadlines, particularly with reference to the return of books.

These returned books cannot be bought by private schools, but new textbooks are available from the publishers' depository in Jackson (School Book Supply) or from individual publishers.

PRIVATE SCHOOLS WITH TEXTBOOK ACCOUNTS

School	*County*	*Address*
Adams County Christian	Adams	P. O. Box 598, Natchez
Amite School Corp.	Amite	P. O. Box 354, Liberty
Pine Hills Academy	Amite	Gloster 39638
Gray Academy	Benton	Ashland 38603
Shaw Edu. Found.	Bolivar	Skene 38775
Presbyterian Day	Bolivar	Box 367, Cleveland 38732
Calhoun Academy	Calhoun	Box 16, Calhoun City 38916
Carroll Academy	Carroll	Carrollton 38917
Chickasaw Academy	Chickasaw	Van Vleet. Box 7 38877
Clarke Academy	Clarke	Pachuta 39347
Oak Hill Academy	Clay	Box 351, West Point 39773
Pheba Academy	Clay	Rt. 2, Box. 13B, Pheba 39755
First United Methodist	Coahoma	Box 603, Clarksdale
St. George Episcopal	Coahoma	Box 276, Clarksdale 38614
Union Private	Copiah	Rt. 1, Hazlehurst 39083
Copiah Academy	Copiah	Box 125, Gallman 39077
Covington County Found.	Covington	Mt. Olive 39119
Sanford Private	Covington	Rt. 1, Seminary 39479
Highway Bap. Paroch. Acad.	DeSoto	Box 42, Southaven 38671
Beeson Academy	Forrest	Box 430, Hattiesburg 39401
Grenada Lake Academy	Grenada	Gore Springs 38929

School	*County*	*Address*
Kirk Academy	Grenada	Box 478, Grenada 38901
Christ Episcopal Day	Hancock	Bay St. Louis 39560
Westminster Academy	Harrison	5005 Lawson Ave., Gulfport
Central Holmes Academy	Holmes	Drawer J, Lexington 39095
Cruger-Tchula Academy	Holmes	Cruger 38924
East Holmes Academy	Holmes	West 29192
Four County Academy	Holmes	Pickens 39146
Saints Academy	Holmes	Lexington 39095
Humphreys Academy	Humphreys	Belzoni 39038 Box 179
Live Oak Academy	Jackson	Box 636, Kreole 39563
Heidelberg Baptist Academy	Jasper	Heidelberg 39439 Box 182
Claiborne Edu. Found.	Jefferson	Box 266, Lorman 39096
Prentiss Christian	Jeff Davis	Prentiss 39474
St. John's Day (Episc.)	Jones	520 5th Ave., Laurel 39440
College Hill Academy	Lafayette	College Hill Rd., Oxford
Jeff Davis Academy	Lauderdale	Rt. 7, Meridian 39301
Lawrence County Academy	Lawrence	Box 607, Monticello 39654
Leake Academy	Leake	Madden 39109
Pillow Academy	Leflore	Greenwood 38930
S. W. Miss. Christian Acad.	Lincoln	Ruth 39662
Brookhaven Academy	Lincoln	Box 946, Brookhaven 39601

School	*County*	*Address*
Heritage Academy	Lowndes	623 Willowbrook, Columbus
East Lowndes Academy	Lowndes	Rt. 1, Steens 39766
Canton Academy	Madison	311 S. Liberty, Canton
Tri-County Academy	Madison	Box K, Flora 39071
Madison-Ridgeland Academy	Madison	Madison 39110, Rt. 1, Bx 375
Columbia Academy	Marion	Box 189, Columbia 39429
West Marion Academy	Marion	Box 63, Kokomo 39643
Marshall Academy	Marshall	Box 427, Holly Springs 38635
Mt. Pleasant Christian	Marshall	Mt. Pleasant 38649
C A D E T School	Marshall	Holly Springs 38635
Montgomery-Carroll Acad.	Montgomery	121 Fairground, Winona
The Pioneer School	Neshoba	Peebles Ave., Philadelphia
Newton County Academy	Newton	Decatur 39327
Central Academy	Noxubee	Box 231, Macon 39341
Starkville Academy	Oktibbeha	Box 796, Starkville 39759
N. Delta Schools, Inc.	Panola	Box 40, Como 38619
West Panola Schools	Panola	Box 718, Batesville 38606
First Baptist Parochial	Panola	Box 466, Batesville 38606
Parklane Academy	Pike	McComb 39648 Box 751
Quitman Co. Edu. Found.	Quitman	Box 56, Marks 38646
Brandon Academy	Rankin	127 Pleasant St., Brandon

School	*County*	*Address*
East Rankin Academy	Rankin	Pelahatchie 39145
Rankin Academy	Rankin	Box 98, Star 39167
Scott County Christian	Scott	Harperville 39080
Sharkey-Issaq. Academy	Sharkey	Rolling Fork Box 248
Simpson Academy, Inc.	Simpson	Box 206, Mendenhall 39114
Sylva Bay Academy	Smith	Box 165, Bay Springs
Indianola Academy	Sunflower	Indianola 38751
N. Sunflower Edu. Found.	Sunflower	Ruleville 38771
Central Delta Academy	Sunflower	Box 145, Inverness 38753
W. Tallahatchie Academy	Tallahatchie	Box 111, Sumner 38957
~~N. Central Miss. Schools~~	~~Tallahatchie~~	~~Enid 38927~~
Strider Academy	Tallahatchie	Rt. 2, Charleston 38921
Northwest Academy	Tate	Box 44, Arkabutla 38602
Hillcrest Academy	Tate	Rt. 1, Senatobia 38668
Magnolia Heights Acad.	Tate	Senatobia, Box 467 38668
Tunica Institute	Tunica	Box 966, Tunica 38676
Citizen's Elem. School	Warren	18A Porter's Chapel Rd. Vicksburg 39180
Deer Creek Academy	Washington	Box 2086, Arcola 38722
Wayne Co. School Found.	Wayne	Box 117, Buckatunna 39322
Centreville Academy	Wilkinson	Box 1458, Centreville 39631

School	*County*	*Address*
Winston County Academy	Winston	Box 545, Louisville 39339
Benton Academy	Yazoo	Box 70, Benton 39039
Woodland Hills Bap. Acad.	Hinds	3327 Old Canton Rd. Jackson 39216
Terry Academy	Hinds	Terry 39170
St. Andrews Day School	Hinds	4120 Old Canton Rd. Jackson 39216
Jackson Academy	Hinds	4908 Ridgewood Rd. Jackson 39211
Southwest Academy	Hinds	2877 Fairhill, Jackson
Kemper Academy	Kemper	Box 82, DeKalb 39328
Jesus Name Faith School	Jones	Rt. 4, Box 166, Laurel
Chamberlain-Hunt Academy	Caliborne	Port Gibson 39150
The Education Center	Hinds	4080 Old Canton Rd. Jackson 39216
St. Michael's Farm for Boys	Pearl River	P. O. Drawer 640, Picayune
Ark Academy	DeSoto	Rt. 1, Box 743, Olive Branch
Baxterville Christian School	Lamar	Rt. 4, Lumberton 39455
Riverside Baptist School	Coahoma	Box 540, Clarksdale
Miss. Training Schools	Hinds	706 Robert E. Lee Bldg. Jackson

School	*County*	*Address*
Heritage School for Excep. Children	Hinds	P. O. Box 10446 Westland Jackson
Pearl River Academy	Pearl River	Rt. 2, Box 223-2, Picayune
Walthall Academy	Walthall	Box 125, Tylertown 39667
Gospel Lighthouse Christian	Warren	Rt. 7, Box 254, Vicksburg
Yalobusha Academy	Yalobusha	Box 266, Coffeeville
Jackson Christian Academy	Hinds	Hwy. 55 N. (Meadowbrook Ch. of Christ) Jackson
Meridian Learning Center	Lauderdale	1115 22nd Ave. Meridian
Shalimar Private School	Harrison	912 Lameuse St., Biloxi
New Bethel Christian School	Lawrence	Rt. 3, Jayess 39641

DEFENDANT'S EXHIBIT NO. 3

VITA

1. GRADY E. HARLAN
Box 685
University, Mississippi
38677

Born: June 11, 1934
Married, 3 children

Home Phone 234-7706 AC 601
Office Phone 232-7069 AC 601

2.

Degree	Date	Major	Institution
B.S.	1957	Health & Recreation	Western New Mexico University
M.S.	1958	Counseling & Guidance	Western New Mexico University
Ph.D.	1964	Counseling & Guidance	University of Iowa

3. Experience

1969-Present Chairman, Department of Guidance and Educational Psychology — University of Mississippi

1966-Present Consulting Psychologist to V.A. Hospital — Tuskegee, Alabama

1965-69 Associate Professor of Counselor Education — Auburn University

1966-68 Director of Vocational Rehabilitation Training Grant — Auburn University

1968 Director of Workshop for personnel interested in the General Aptitude Test Battery — Auburn University

1967 Director of Workshop for Counselors working in Desegregated Schools — Auburn University

1967 Director of State Department of Education Counselors Workshop — Auburn University

1966-67 Director of State Department of Industrial Relations Counselor Training Program — Auburn University

1966 Director of Coosa County Counselor Workshop — Auburn University

1966 Director of Etowah County Counselors Workshop — Auburn University

1966 Director of NDEA Counseling & Guidance Institute — Auburn University

1964-65 Research Consultant to Governor's (Wyoming) Planning Commission for Mental Health Research Project — University of Wyoming

1964 Director of a Workshop on Vocational Choice Theory — University of Wyoming

1964 Director of Governor's (Wyoming) Planning Commission for Mental Health Research Project — University of Wyoming

1962-65 Assistant Professor of Counselor Education — University of Wyoming

1962 Graduate Assistant — University of Iowa

1960-62 Director of Guidance & Counselor Laboratory School — University of Iowa

1960 Senior High School Counselor — Albuquerque Public Schools

1959 Junior High School Counselor & English Teacher — Albuquerque Public Schools

1958 Elementary Teacher — Albuquerque Public Schools

4. Offices held, Panel Memberships, Membership in Professional & Learned Societies

Honors & Awards

1963 Chairman of an A.C.E.S. Study group on Practicum Standards

1964 Vice President (President elect) Albany County Mental Health Association, Laramie, Wyoming

1964 Psi Chi

1966 Workshop Participant on Careers in the Space Age, N.A.S.A. Huntsville, Alabama, George C. Marshall Space Flight Center

1965-66 Vice President, Lee County Mental Health Association, Auburn, Alabama

1966 Phi Delta Kappa

1966 Member of an NCATE Evaluation team

1966-67 Member of School of Education Research Committee

1967 Program Committee, Alabama Guidance Association

1967 Editor of the Proceedings of Alabama Guidance Association Workshop

1966 Member of National Council for Accreditation of Teacher Education Evaluation Team

1968 Rehabilitation Service Administration Workshop on Training Paraprofessionals

1968 Chairman of Phi Delta Kappa Research Committee

1968 President Lee County Mental Health Association

1968 Permanent tenure, Auburn University

1969 Rehabilitation Service Administration Workshop on Counselor Communication

1970 Chairman, Mississippi Counselor Educators

1971 Leadership Training Institute, Phoenix, Arizona

Memberships

Member of American Personnel & Guidance Association, Association For Counselor Education & Supervision, American School Counselor Association, American Psychological Association, and American Association of University Professors, National Council on Measurement in Education, Alabama Guidance Association, Alabama Psychological Association, Southern Association for Counselor Education Supervision, Alabama Mental Health Association

5. A. Teaching Experience

1. Undergraduate Courses
   a. Introduction to Education
   b. Principles of Guidance

2. Graduate Courses
   a. Principles of Guidance
   b. Counseling Theory
   c. Counseling Practicum
   d. Analysis of the Individual
   e. Group Procedures
   f. Information Services
   g. Vocational Development Theory
   h. Organization & Administration of Guidance Services
   i. Special Problems in Counseling & Guidance

j. Evaluation & Research Methods in Counseling & Guidance
k. Counseling in the Elementary School
l. Individual Intelligence Testing
m. Psychological Testing
n. Research Design in Counseling

3. Advisement	Completed	In Progress
a. Masters Thesis	16	3
b. Masters Non-Thesis	90	109
c. Specialist in Education and 6th year students	19	5
d. Doctoral Dissertation	25	7

B. Publications & Creative Works

A. "A Comparison of Differences in Selected Characteristics Among High School Seniors, College Freshmen, Trade School Students, Technical School Students & Business College Students" — Dissertation Abstract, 1964.

B. Speech — "The Counselors Role in Vocational Development" published by Florida State Department of Education, 1967.

C. Speech — "The Use of Group Procedures by High School Counselors," Florida State Department of Education, 1967.

D. Editor — "Proceedings of the Fall, 1967 Alabama Guidance Association Workshop."

E. "Comparison of Sixteen Personality Factors Among Counselors and Administrators," Personnel & Guidance Journal, (in Press 1968).

F. The Relationship of Vocational Interest and Personality Measures for a Counselor Trainee Sample (submitted for publication 1968).

G. Verbal Conditioning as a Function of Selected Visual and Auditory Characteristics of the Experimentor (submitted for publication 1968).

H. "Contingency Contracting With Disadvantaged Elementary School Children" (submitted for publication 1970).

6. *Proposals Submitted which were funded*
A. NDEA Counseling & Guidance Institute
B. Vocational Rehabilitation Administration Planning Grant
C. Vocational Rehabilitation Administration Training Grant
D. State Department of Education Counselor Workshop
E. The Governor's Planning Commission for Mental Health Research Project

F. Research Consultant — The Governor's Planning Commission for Mental Health Research Project.
G. Etowah County Counselor's Workshop
H. Coosa County Counselors Workshop
I. Workshop for Counselors Working in Desegregated Schools
J. Workshop for Personnel to Learn the Uses of the GATE
K. Block Training Program for Rehabilitation Counselors
L. Workshop for Counselors in Mississippi
M. N.D.E.A. Project to Train Counselors of the Disadvantaged (Poor)

7. *Papers Read*
   A. "Research in Counseling & Guidance," Rocky Mountain ACES, 1963
   B. "Measuring Movement & Counseling," Colorado — Wyoming, ACES, 1964
   C. "Existential Philosophy and Counseling," Creighton University, 1964.
   E. "Certification of School Psychologist in Mississippi," 1970
   F. "The Elementary School Counselor's Role and Function" Florida State University, 1969

8. *Extension, Continuing Education or Public Activities*
   A. Consultant on a continuing basis to:
      (1) Choctaw County School System (1965 - Present)
      (2) Troy City School System (1965-68)
      (3) Decatur City School System (taught individual testing course) 1967-68

      (4) Etowah County School System (1965 - Present)
      (5) Macon County School System (1965 - Present)
      (6) Southern State Junior College (1967 - Present)

   B. Consultant on a one day experience to about thirty schools on various problems related to Counseling & Guidance

   C. Consultant to the following special groups:
      (1) Specialty Student Research Project
      (2) University of Wyoming N.D.E.A. Counseling & Guidance Institute
      (3) Florida State Department of Education
      (4) Alabama State Department of Education (using test results for program evaluation)
      (5) Mississippi State Department of Education (Counselor Certification)

DEFENDANT'S EXHIBIT NO. 4

Department of the Treasury
District Director
Internal Revenue Service
Date: July 3, 1973 In reply refer to: 430: HMB:emo

Mr. W. A. Matthews
Text Book Department
P. O. Box 1075
Jackson, Mississippi 39202

Dear Mr. Matthews:

Enclosed are two lists of private schools in Mississippi. One is a list of the schools which were originally granted exempt status under Section 501(c)(3) of the Internal Revenue Code, but subsequently their exempt status was revoked or terminated.

The other list contains the names and addresses of Mississippi educational organizations which were recognized as exempt from Federal Income Taxes under Section 501(c)(3) of the Internal Revenue Code as of December 31, 1972. Additional exemptions may have been granted subsequent to that time. Exemption letters are issued to all organizations exempt under 501(c)(3) of the Internal Revenue Code, advising them of their exempt status.

Also attached is a copy of the requirements set forth in the Green vs. Connally case, in order for an educational organization in Mississippi to obtain tax exempt status under Section 501(c)(3) of the Internal Revenue Code. The organizations reflected on the list which are presently exempt, have complied with these requirements.

Sincerely yours,

/s/ OWEN D. RYAN
Owen D. Ryan
Chief, Review Staff

Enclosures

James L. McBride, Department of Justice, Washington, D. C. 20530, for defendants. George S. Leonard, Leonard, Clammer & Flues, 1725 K St., N. W., Washington, D. C., for intervenors.

Before LEVENTHAL, Circuit Judge, and WADDY and PRATT, District Judges.

Order for Declaratory Relief and Permanent Injunction

Upon consideration of the motions, oppositions, pleadings, affidavits, exhibits, admissions and depositions of the parties, and after hearing argument, this court for the reasons set forth in the opinion filed herewith hereby enters the following order:

It is this 30th day of June, 1971,

I. Declaratory Relief

Declared that:

A. Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.

B. As used in this Order, the term "racially nondiscriminatory policy as to students" means that the school or other educational institution admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

II. Permanent Injunction

Ordered, Adjudged, and Decreed that defendants John B. Connally, as Secretary of the Treasury, and Randolph W. Thrower, as Commissioner of Internal Revenue, their agents, servants, employees, and attorneys are enjoined and restrained as follows:

(A) From approving any application for tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 for any private school located in the State of Mississippi unless such private school makes a showing in support of its exemption application—

(1) That the school has publicized the fact that it has a racially nondiscriminatory policy as to students, meaning that it admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and further meaning, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

(2) That the school has publicized this policy in a manner that is intended and reasonably effective to bring it to the attention of persons of student age (and their families) who are of minority groups, including all nonwhites. Specifically but not exclusively the school must—

(a) if it chooses to publicize this policy in printed notices, caption such notices in such a way as to call attention to the notice, for example bold face heading, and to call attention to its nature as a notice of racially nondiscriminatory policy as to students;

(b) provide reference to its nondiscriminatory policy in its brochures and catalogues and also in any printed advertising which it uses as a means of informing applicants of its programs;

(c) comply with such further requirements as to contents, prominence, and form of publicizing of policy, and as to frequency of reiteration, as the Internal Revenue Service may provide;

(d) certify that it has made no statements, and taken no actions, qualifying or negating its published statements of nondiscriminatory policy as to students.

(B) From approving any application for tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954, for any private school located in the State of Mississippi unless such private school has supplied the Internal Revenue Service with the information set forth below, which the court finds material in order for the Service to be in an effective position to determine whether the school has actually established a policy of nondiscrimination, as follows:

(1) Racial composition, as of the pending academic year, as projected so far as may be feasible for the subsequent academic year, of—

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A List of Mississippi Educational Organizations Which Were at One Time Recognized as Exempt from Federal Income Tax Under Section 501(c)(3) of the Internal Revenue Code, But Whose Exemption Was Subsequently Revoked or Terminated

*Academic Foundation Inc. — Canton
North Union Ext.
Canton, Ms. 39046

*Adams County Private School System
P. O. Box 851
Natchez, Ms. 39120

**Board of Governors of the Long Beach Schools Headstart
Jeff Davis Avenue
Long Beach, Ms. 39560

*Brandon Educational Foundation, Inc.
Brandon, Ms. 39042

*Calhoun Educational Foundation Corporation
P. O. Box 16
Calhoun City, Ms. 38916

*Central Homes Academy
Drawer J
Lexington, Ms. 39095

*The Citizens Educational Foundation
P. O. Box 448
Vicksburg, Ms. 39180

*Caliborne Educational Foundation, Inc.
P. O. Box 266
Lorman, Ms. 39096

*Columbus Educational Foundation, Inc.
P. O. Box 449
Columbus, Ms. 39701

*Council School Foundation
254 East Griffith Street
Jackson, Ms. 39202

*Covington School Foundation, Inc.
Mount Olive, Ms. 39119

*Cruger-Tchula Academy Foundation
P. O. Box 155
Cruger, Ms. 38924

*East Holmes Academy
P. O. Box 247
West Point, Ms. 39192

*Educational Foundation, Inc. — Clay County
206 Court Street
West Point, Ms. 39773

*Education Foundation, Inc. — Benton County
Ashland, Ms. 38602

*Forrest County School Foundation, Inc.
Airport Road
Hattiesburg, Ms. 39401

*Greenwood — Leflore Educational Foundation, Inc.
P. O. Box 1880, Hwy. 82 West
Greenwood, Ms. 38930

*Grenada Educational Foundation, Inc.
P. O. Box 478
Grenada, Ms. 38901

**Gulf Park College Corporation
Long Beach, Ms. 39202

*Harrison County Private School Foundation
1515-17 Father Ryan Avenue
P. O. Box 325
Biloxi, Ms. 39533

**Hattiesburg Academy, Inc.
203 S. 31st Avenue
Hattiesburg, Ms. 39401

*Humphreys Academy Foundation
P. O. Box 158
Belzoni, Ms. 39038

*Lamar School Foundation
Box 722
Meridian, Ms. 39301

*North Sunflower County Educational
Foundation, Inc.
P. O. Box 6
Drew, Ms. 38737

*Noxubee Educational Foundation
P. O. Box 231
Macon, Ms. 39341

*Oktibbeha Educational Foundation, Inc.
204 Bridal Path

*Parents Educational and Development
Foundation, Inc.
Box 63
Meridian, Ms. 39301

*Paspoint Private School
P. O. Box 636
Kredle, Ms. 39597

*Pines Private School Foundation
P. O. Box 307
Wiggins, Ms. 39577

*Rebul Academy, Inc.
Learned, Ms. 39093

*Shaw Educational Foundation
Shaw, Ms. 38773

*Sharkey-Issaguena Academy Foundation
Rolling Fork, Ms. 39159

**Southside Academy
110 Alta Woods Boulevard
Jackson, Ms. 39204

*Southwest Academy
1045 Dorgan Street
Jackson, Ms. 39204

*Southwest Mississippi Christian Academy
Box 248
Summit, Ms. 39666

*Tunica Institute of Learning, Inc.
P. O. Box 966
Tunica, Ms. 38676

*Jackson Academy, Inc.
Jackson, Ms. 39200

*Revocation
**Terminations

A List of Mississippi Educational Organizations Which Are Presently Recognized as Exempt from Federal Income Tax Under Section 501(c)(3) of the Internal Revenue Code

All Saints Episcopal School
Confederate Avenue
Vicksburg, Ms. 39180

Bellhaven College
1500 Peachtree Street
Jackson, Ms. 39202

Blue Mountain College
P. O. Box 278
Blue Mountain, Ms. 38610

Christ Episcopal Day School
South Beach Blvd.
Bay Saint Louis, Ms. 39520

Christian Aided Development Through Extraordinary Training (CADET)
815 Van Dorn Street
Holly Springs, Ms. 38635

Clarke Memorial College
P. O. Box 440
Newton, Ms. 39345

Columbia Academy
P. O. Box 189
Columbia, Ms. 39429

Copiah Educational Foundation, Inc.
317 Gallatin Street
Hazelhurst, Ms. 39083

Deer Creek Educational Institute, Inc.
Hollandale, Ms. 38748

Educational Foundation, Inc. — Clinton
106 E. Cynthia Road
Clinton, Ms. 39205

Educational Foundation, Inc. — Marshall County
Holly Springs, Ms. 38635

Educational Foundation, Inc.
P. O. Box 65
Lucedale, Ms. 39452

Friends of Children of Mississippi, Inc.
108 Minerva Street
Jackson, Ms. 39203

The Heritage School
P. O. Box 10446 Westland Station
Jackson, Ms. 39209

Indianola Educational Foundation, Inc.
305 East Gresham St.
Indianola, Ms. 38751

Lula Rich Educational Foundation, Inc.
P. O. Box 338
Lula, Ms. 38644

Mary Holmes College, Inc.
West Point, Ms. 39773

Mississippi College
Clinton, Ms. 39056

Mississippi Heights Academy, Inc.
Blue Mountain, Ms. 38610

Mississippi Industrial College
Holly Springs, Ms. 38635

Little Red School House for Special Instruction
Jackson, Ms. 39200

Natchez College
1010 N. Union St.
Natchez, Ms. 39120

North Delta School, Inc.
P. O. Box D
Crenshaw, Ms. 38621

Pentecostal Bible Institute, Inc.
P. O. Box 1190
Tupelo, Ms. 38801

Pine Forest Academy Sanitarium Hospital
Chunky, Ms. 39323

Piney Woods Country Life School
P. O. Box 26
Piney Woods, Ms. 39148

Prentiss Normal & Industrial Institute
Drawer C
Prentiss, Ms. 39474

Quitman County Educational Foundation, Inc.
P. O. Box 56
Marks, Ms. 38646

Reformed Theological Seminary
5422 Clinton Blvd.
Jackson, Ms. 39209

Rust College
Holly Springs, Ms. 38635

Saints Industrial and Literary School
Lexington, Ms. 39095

Singing River Educational Association, Inc.
P. O. Box 51
Lucedale, Ms. 39452

St. Aloysius High School
2003 Clay St.
Vicksburg, Ms. 39180

St. Andrews Episcopal Day School
4120 Old Canton Rd.
Jackson, Ms. 39216

St. Johns Day School
520 Fifth Ave.
Laurel, Ms. 39440

St. Marks Educational Day Care Center
901 W. Pearl St.
Jackson, Ms. 39201

Tougaloo College
Tougaloo. Ms. 39174

Utica Junior College
Utica, Ms. 39175

Whitworth College
Brookhaven, Ms.

DEFENDANT'S EXHIBIT NO. 4

Pygmalion of story and drama. In Ovid's account, Pygmalion fell in love with his own sculpture of the perfect woman, and Venus, who spent a lot of time granting requests in those days, gave life to Galatea. In George Bernard Shaw's version 19 centuries later, Henry Higgins turns a Cockney flower girl into an elegant Lady, relying on language rather than love.

Most of us do not have Pygmalion's power to manufacture the ideal mate, nor do we all share Higgins' fondness for phonetics. But we may have an extraordinary influence, of which we are often oblivious, on others. Psychologists have not yet learned how to produce Galatea or her male equivalent in the laboratory, but they have demonstrated that the power of expectation alone can affect the behavior of others. The phenomenon has come to be called self-fulfilling prophecy: people sometimes become what we prophesy for them.

This point has long been argued on an intuitive basis. It is obvious, for example, that ghetto children, whose academic performance worsens the longer they remain in school, tend to have teachers who are convinced that the children cannot learn. However, one could argue that teachers expected little because the students behaved poorly, rather than the other way around. To see which comes first, the expectation or the performance, we turned to the laboratory.

In the first study of this problem, over a decade ago, Kermit Fode and I asked 10 students to be "experimenters." We gave each experimenter, to a rat, about 90 subjects. The experimenter showed each of his subjects a series of faces, which the subject rated on "degree of success or failure" from +10 to -10. We had previously selected photos that most people consider quite neutral.

We gave our experimenters identical instructions on how to administer the test, with one exception. We told half of them that the "well established" finding was that the subjects would rate the photos positively, we told the rest that subjects would probably rate the photos negatively.

Expectant Voices. In spite of the fact that all experimenters read the same instructions to their subjects, we found that they still managed to convey their expectations. Experimenters who anticipated positive photo ratings got them, while those who expected negative ratings got them too. How did the experimenters silently let their subjects know what they wanted? John Adair and Joyce Epstein repeated this experiment and tape-recorded the experimenters reading the instructions. They got the same results we did, and then repeated their experiment, this time using only the tape recordings of their experimenters to instruct their new sample of subjects. They found that subjects exposed only to these tape recordings were just as much influenced by their experimenter's expectations as were those subjects who had experienced "live" experimenters. Apparently, tone of voice alone did the trick.

Almost five years ago, the author proposed that students live up, or down, to their teachers' expectations of them. He said teachers express their opinions consciously and unconsciously, in word, grimace and gesture, and that teachers who think their students are bright teach harder. The Pygmalion theory caused consternation and quarrels among teachers and researchers. Now comes the author again, with a larger sheaf of evidence to show that he was right.

The Pygmalion Effect Lives

by Robert Rosenthal

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Such results generated a spate of studies. Larry Larrabee and L. Dennis Kleinsasser found that experimenters could raise the IQ scores of children, especially on the verbal and information subtests, merely by expecting them to do well. Samuel Marwit found that patients will interpret Rorschach inkblots as animals or human beings, depending on what the examiner has been led to expect. And Ronald Johnson, in an ingenious and carefully controlled study, found that experimenters could improve their subjects' performance on a task requiring subjects to drop as many marbles as possible through one of several holes in the table top by expecting them to do well.

Self-fulfilling prophecies even work for animals. Bertrand Russell, who had something to say about nearly everything, noticed that rats display the "national characteristics of the observer. Animals studied by Americans rush about frantically, with an incredible display of hustle and pep, and at last achieve the desired result by chance. Animals observed by Germans sit still and think, and at last evolve the solution out of their inner consciousness."

Fondling Smart Rats. Russell was not far off. Fode and I told a class of 12 students that one could produce a strain of intelligent rats by inbreeding them to increase their ability to run mazes quickly. To demonstrate, we gave each student five rats; which had to learn to run to the darker of two arms of a T-maze. We told half of our student-experimenters that they had the "maze-bright" intelligent rats, we told the rest that they had the stupid rats. Naturally, there was no real difference among any of the animals.

But they certainly differed in their performance. The rats believed to be bright improved daily in running the maze – they ran faster and more accurately – while the supposedly dull animals did poorly. The "dumb" rats refused to budge from the starting point 29 percent of the time, while the "smart" rats were recalcitrant only 11 percent of the time.

Then we asked our students to rate the rats and to describe their own attitudes toward them. Those who believed they were working with intelligent animals liked them better and found them more pleasant. Such students said they felt more relaxed with the animals; they treated them more gently and were more enthusiastic about the experiment than students who thought they had dull rats to work with. Curiously, the students with "bright" rats said that they handled them more but talked to them less. One wonders what students with "dull" rats were saying to those poor creatures.

If rats act smarter because their experimenters think they are smarter, we reasoned, perhaps the same phenomenon was at work in the classroom. So in the mid-1960s Lenore Jacobson and I launched what was to become a most controversial study.

Intellectual Bloomers. We selected an elementary school in a lower-class neighborhood and gave all the children a nonverbal IQ test at the beginning of the school year. We disguised the test as one that would predict "intellectual blooming." There were 18 classrooms in the school, three at each of the six grade levels. The three rooms for each grade consisted of children with above-average ability, average ability, and below-average ability.

After the test, we randomly chose 20 percent of the children in each room, and labeled them "intellectual bloomers." We then gave each teacher the names of these children, who, we explained, could be expected to show remarkable gains during the coming year on the basis of their test scores. In fact, the difference between these experimental children and the control group was solely in the teacher's mind.

Our IQ measure required no speaking, reading, or writing. One part of it, a picture vocabulary, did require a greater comprehension of English, so we call it the verbal subtest. The second part required less ability to understand language but more ability to reason abstractly, so we call it the reasoning subtest.

We retested all the children eight months later. For the school as a whole, we found that the experimental children, those whose teachers had been led to expect "blooming," showed an excess in overall IQ gain of four points over the IQ gain of the control children. Their excess in gain was smaller in verbal ability, two points only, but substantially greater in reasoning, where they gained seven points more than the controls. Moreover, it made no difference whether the child was in a high-ability or low-ability classroom. The teachers' expectations benefited children at all levels. The supposed bloomers blossomed, at least modestly.

This experiment, and the book we wrote based on it, met with vigorous criticism. Professor Arthur Jensen of UC, Berkeley, for example, offered three basic arguments.

First, said Jensen, we should have compared classrooms rather than individual children, and this would have produced only negligible IQ changes. But Jensen ignored the fact that we had done that analysis, and that it led to even larger effects than the per-child comparisons.

Second, Jensen objected to the fact that we used the same IQ test twice. The children were familiar with the test when they took it again, he said, so their scores might have improved for that reason. However, Jensen must then explain why the experimental children showed more of these "practice effects" than the control children, who also took the test twice.

Finally, Jensen did not think that the teachers themselves should have given the tests. However, we had already accounted for this problem by having people who knew nothing of the experiment retest the children. The effects of the teachers' expectations actually increased.

R.L. Thorndike added another objection, namely that our IQ test was an unreliable measure, especially for the youngest children, and that any inference

The teachers' expectations benefited children at all levels.
The supposed bloomers blossomed, at least modestly.

based on such a test would be invalid. I do not think that our test was as worthless as Thorndike implies, but even if it was seriously unreliable we are still left with the basic question: Why did the experimental children improve significantly? An unreliable measure would make it *harder* to find differences between the two groups, not easier.

The most ambitious critique of our Pygmalion in the classroom work was a book by Janet Elashoff and Richard Snow, who completely reanalyzed our original data. They could not disprove the fact that the experimental children did gain more IQ points than control children, even though they transformed our original IQ measure into eight different forms, some of which were biased statistically to minimize any effects of teachers' expectations.

The debate continued, and so did the research. Others sought to discover the Pygmalion effect, and not everyone was successful, which contributed to the controversy. By now 242 studies have been done, with all sorts of subjects and situations. Of these, 84 found that prophecies, i.e. the experimenters' or teachers' expectations, made a significant difference.

But we must not reject the theory because "only" 84 studies support it; on the contrary. According to the rules of statistical significance, we could expect five percent of those 242 studies (about 12) to have come out as predicted just by chance. The fact that we have 84, seven times more than chance would dictate, means that the Pygmalion effect does exist in certain circumstances. Moreover, it is not limited to young children and rats; adolescents and adults are affected too.

Outside the Lab. And the Pygmalion effect is as likely to occur in the real world as in the experimenter's tower. Of the 242 studies that have been done to date, 57 took place outside the laboratory—in a classroom, a factory, an office, and the like. The proportion of significant results is about the same for experiments conducted in the field as in the laboratory, some 37 percent for the field and 34 percent for the laboratory.

For example, Randy Burnham and Donald Hartsough found Pygmalion in the swimming pool. Their subjects were boys and girls, ages seven to 14, who were learning to swim at a summer camp. Half of the instructors were led to think that they were dealing with a "high-potential" group, and their students became better swimmers, by the end of their two-week camping period, than the regular group. And another team of researchers found that it took only two weeks for teen-age girls, who were institutionalized for various offenses, to show a marked improvement in their classroom behavior when they had been labeled "potential bloomers."

Even the United States Air Force Academy Preparatory School succumbed. W. R. Schrank randomly assigned 100 enlisted airmen to one of five math classes, and he told the teachers that each class contained students selected for different levels of ability. The boys in the supposed high-ability classes improved their math scores substantially.

J. Michael Palardy tested the popular assumption that boys have a tougher time learning to read than girls. First grade teachers are well aware of this folk belief, and thus have clear expectations when they give reading lessons. Palardy surveyed 63 teachers and found five who believed that boys could learn to read as well as girls in the first grade. He matched these five on a number of factors—background, teaching methods, etc.—with five who believed in the stereotype. Indeed, teachers who expected to discover sex differences in reading ability found them. But the boys did just as well as the girls when their teachers thought they would. (As a footnote to this study, the "well-known" sex difference in learning to read also tends to disappear when the children learn from teaching machines rather than from teachers.)

Albert King moved the Pygmalion paradigm into the work world with an ingenious set of five experiments. King was interested in the effects of supervisor expectations on the job performance of disadvantaged workers (unemployed or underemployed, mostly black and members of other minorities). In three of his studies the workers were women in training to become nurses' aides, presser-machine operators, or assemblers of electronic equipment. In the other two studies, the workers were men who were learning to become auto mechanics or welders.

In each experiment, King randomly picked the names of some of the trainees, and told the supervisors that these workers showed a special potential for their particular job. King collected several measures of the workers' performances: objective tests, peer ratings, absences and so on. (King ignored the supervisors' ratings of trainees, since these might reflect only their perception and not actual changes in their performance.) The Pygmalion effect worked in four of the five experiments—for every group of trainees but the nurses' aides. Trainees whose supervisors had expected high job performance of them did much better than the control groups. However, the effect was especially marked among male workers, the welders and mechanics, and less so among female workers, the pressers and assemblers. Perhaps the supervisors found it harder to accept the idea that women could have "special potential" for their work.

Average Performance Ranks (Lower Ranks Indicate Superior Performance):

study	control group	experimental group
1 welders	9.9	3.6
2 mechanics	10.7	4.3
3 pressers	9.2	5.3
4 assemblers	11.3	7.8
5 nurses' aides	9.2	8.3

All of this research supported our feeling that self-fulfilling prophecy is a real phenomenon, that it occurs both in and out of the classroom and the laboratory. The next step was to figure out what subtle forces are going on in the exchange between teacher and learner. What makes average kids increase their IQ, neophytes swim better, and trainees learn faster? How does A communicate his or her expectations to B, especially when both A and B probably are unaware of the process? **Explaining the Pygmalion Effect.** The current evidence leads me to propose a four-factor "theory" of the influences that produce the Pygmalion effect. People who have been led to expect good things from their students, children, clients, or what-have-you appear to:

—create a warmer social-emotional mood around their "special" students (*climate*);

—give more feedback to these students about their performance (*feedback*);

—teach more material and more difficult material to their special students (*input*); and

—give their special students more opportunities to respond and question (*output*).

There is nothing magical or definitive about the choice of these four, and in fact, none of them is independent of the others. My criterion for including each as a factor is that there be at least five studies that support it and that no more than 20 percent of the studies bearing on each factor contradict it.

The Climate Factor. "Climate" apparently has to do with warmth, attention, and emotional support. Fourteen studies have investigated this factor, 12 of which came out as predicted. Not all of them dealt with the teacher-student relationship; some took place in industrial and clinical contexts as well.

For example, Geri Alpert told a group of psychiatrists that some of their patients had been specially selected for them on the basis of "therapeutic compatibility." She gave them no expectations about the rest of their patients. Later Alpert asked the patients to describe their therapists and their sessions together. From a patient's-eye view, psychiatrists behave more warmly toward people with whom they expect to be compatible and who are likely to get well.

Alan Chaikin, Edward Sigler, and Valerian Derlega asked male and female college undergraduates to teach a short unit on home and family safety to a 12-year-old boy. One third of the "teachers" thought that the boy had an IQ of 130 and did very well in school; one third thought that the child had an IQ of 85 and did poorly in school; and the last third had no information about the boy's IQ. Then the experimenters videotaped the exchange between teachers and student to see what nonverbal cues were going on.

Teachers who thought they were dealing with a bright student were more likely to smile at the boy, nod their heads approvingly, lean toward the boy, and look him in the eye for longer periods. A variety of analogous studies have found that "special-potential" subjects report their teachers or counselors as being more positive, accepting, perceptive, friendly, fond of them, and supportive.

The Feedback Factor. The difference between this factor and the previous one (for both involve warmth and attention) is that feedback depends on a response from the student. A teacher can be generally warm, but still react critically or indifferently to a child's answers or comments. Feedback refers specifically to how much active teaching occurs: often the teacher rewards a desired response, corrects a wrong answer, asks for the student's further thoughts, and so on. Ten studies explored this factor, of which eight supported it.

Jere Brophy and Tom Good asked first-grade teachers to name their high and low achievers. The researchers then watched the teachers work with the chil-

Teaching Is a Form of Loving

Science is wonderful, I feel sure. But it is sometimes not more than a verification of poetry, of things that poets know, or of things always known by people like poets (storytellers, essayists, village nuts, eccentrics) who went around muttering truths about school teaching: if you smile at a student he will learn more than if you beat him with a stick; or, consider the girl on her merits apart from your memory of her older sister. Give confidence. Have patience. Teaching is a form of loving.

"Adolph Myers was meant by nature to be a teacher of youth. . . . Here and there went his hands, caressing the shoulders of the boys, playing about the tousled heads. . . . In a way the voice and the hands, the stroking of the shoulders and the touching of the hair was a part of the schoolmaster's effort to carry a dream into the young minds." Alas, the poor teacher was almost lynched, and fled from Pennsylvania to Sherwood Anderson's *Winesburg, Ohio*.

Call a teacher at best a poet. After I had been teaching school for 20 years I came upon the accompanying article by Robert Rosenthal, and ended by reading it over more often than I had planned.

I think he began where the poet begins—with certain *feelings* about the relationship between teachers and pupils, drawn from his informal observations, from eavesdropping, and from table-talk in the lunchroom. Science being wonderful, however, he then required experiment to verify his instinct, and I am certain that that is how things must be, that way we are protected against whim. He reviewed 185 experiments bearing upon relationships between the expectations of teachers and the performances of their pupils. He offers tables.

It appears, on the whole, that teachers see what they expect to see, and the pupil sees what the teacher sees.

It's a bad system, in which the teacher hasn't time to see the child behind the expectation. Teachers must "cover the ground" because the State says so, supervisors are watching, bells are ringing, the budget is shrinking. The teacher has finally little encouragement to see the child as the child is, and so depends upon test scores or other advertisements, such as skin color or family income.

In an age and a nation so far advanced as our own (we hear) we might have been expected by now to have resumed respect for ancient instincts: smile at your student; tell him he can, even if you doubt it, and he might. Wait for an answer; it may be on the tip of her tongue. Don't exploit the child by perpetuating the old myth that teacher knows best: the child may know himself better than the teacher knows him.

The work of Rosenthal ought not be lost in the coils of its statistics. It should send us back to those instincts which are the better parts of ourselves. Teachers must learn again to smile, to touch, and if the townsfolk come for us with a rope, as they came for Adolph Myers, we can flee to Ohio.

—Mark Harris

The Pygmalion effect is not limited to young children and rats; adolescents and adults are affected too.

"Special-potential" subjects report their teachers as being more positive, accepting, perceptive, friendly, fond of them, and supportive.

uren. The teachers ignored only three percent of the high achievers' answers but they ignored 15 percent of the low achievers' answers. The good students, then, get more feedback, whether their responses are right or wrong.

Teachers give more feedback to apt undergraduates as well as to apt first-graders. John Lanzetta and T.E. Hannah offered college students the chance to play teacher, and gave them the choice of five kinds of feedback for use in teaching a concept task: a strong electric shock, a mild shock, a neutral light, a small amount of money, and a larger amount of money. The "learner," who was a confederate of the experimenters, gave 36 correct and 84 incorrect answers in all cases.

When the student teachers thought the learner had a "high potential," they rewarded him with the larger sum of money when he was right, and shocked him more severely when he was wrong. When they thought that the learner had a "low learning potential," however, they gave him the lesser reward or punishment. In other words, teachers send clearer, stronger evaluations to students for whom they have greater expectations.

But another experiment found that children believed to be bright got more praise, but not more criticism; criticism was reserved for children believed to be dull. Yet a third study found that supposedly "gifted" children get more praise from their teachers, but found no difference between "gifted" and "regular" children in the criticism they got. The matter is complicated. Perhaps criticism for a wrong answer needs to be accompanied by enough praise and support on other occasions, otherwise the student may see the teacher as overly critical and cold. We can say with modest certainty that praise is a factor in achieving the Pygmalion effect, but the role of criticism is less clear.

The Input Factor. There are only five studies that directly deal with this factor, but all five find that teachers literally teach more to children of whom they expect more.

The most dramatic case in point is W. Victor Beez's work with 40 preschoolers and 60 teachers in a Headstart program. Beez told half of the teachers that they could expect poor performance from their supposedly "below-average" children; the rest expected exceptional performance from their "bright" children. Observers, who had not been told what the teachers' expectations were, noted the exchanges between teacher and child. The teachers worked much harder when they believed they had a bright child. In a unit on word learning for example, 87 percent of the teachers of "bright" children taught eight or more words; but only 13 percent of the teachers of the "dull" children tried to teach them that many. Not surprisingly, 77 percent of the "bright" children learned five or more words, but only 13 percent of the "dull" children learned that many.

Number of words taught:	Teachers' expectation: dull children	bright children
11 or more	0	14
9 or 10	1	10
7 or 8	7	3
5 or 6	15	1
4 or less	7	2
	30	30

Such results tell us that a teacher's expectations about a student's performance are not simply transmitted in subtle voice nuances and a casual facial expression. The expectations may be translated into explicit, overt alterations in teaching style and substance.

The Output Factor. Eleven studies out of 12 done support this factor, indicating that teachers encourage greater responsiveness from students of whom they expect more. They call on such students more often, ask them harder questions, give them more time to answer, and prompt them toward the correct answer. Output is therefore closely related to feedback.

Mary Budd Rowe gives us a good example. She was interested in how long teachers wait for an answer to their question before going on to the next child. She found that many experienced teachers wait only one *second* before they ask the question again, often of someone else. However, Rowe found that teachers wait longer for the students whom they believe to be bright. When Rowe pointed this out to the teachers involved, they reacted with surprise and insight. "I guess we don't expect an answer [of the poor students]," said one, "so we go on to someone else." When these same teachers then deliberately increased their waiting time for their "slower" students, they got increased responsiveness.

Jeffrey Hersh's work illustrates another facet of the output factor. He asked graduate students to administer the Stanford Binet IQ Test to children in a Headstart program. Examiners who had been told the children had high intellectual ability immediately began with more difficult questions. They demanded more of the children, and got more.

An Unexpected Galatea. We know from our original Pygmalion experiment in the classroom that favorable expectations could have a beneficial effect. At the end of the year the teachers had all sorts of good things to say about the "intellectual bloomers": they had a better chance of being successful in the future, said the teachers; they were more appealing, better adjusted, more affectionate and autonomous. So the teachers perceived them, in any case.

We thought that perhaps it was because the experimental children gained more in IQ that the teachers rated their behavior and aptitudes more highly. So we looked at the control-group children who had also gained in IQ that year, to see whether the teachers liked them as much as the bloomers. Such was not the case. To our astonishment, the more the control students increased in IQ, the *less* well adjusted, interesting and affectionate the teachers thought them.

It seems, then, that when a child who is not expected to do well does so, his teacher looks upon his behavior and personality as undesirable. This was especially true, we discovered, for children in low-ability classrooms. Teachers may have a difficult time thinking that a child who has a low-ability label can show an intellectual spurt. They may interpret this change as "maladjustment" or "trouble-making." Perhaps the child doesn't know his place. Several subsequent experiments confirmed this finding, so the hazards of unpredicted success are likely to be real rather than a freak of one study. Alfred Shore, for example, asked teachers to predict their students' intellectual achievement and to describe their students' classroom behavior. A month later, Shore gave the teachers the students' real IQ scores and asked for a reappraisal. Again, teachers downgraded those students in personality and adjustment who had done "too well"—i.e., contrary to their expectations.

It seems that when a child who is not expected to do well does so, his teacher looks upon his behavior and personality as undesirable

Eleanor Leacock studied four schools in four neighborhoods, two poor and two middle-income. Within each income level one school was essentially all black and the other essentially white. Leacock interviewed the fifth-grade teachers about their feelings for the children, and scored their comments for positive, neutral, or negative feelings and attitudes.

Double Handicap. Leacock found that the teachers were much less favorable to the lower-class children than they were to the middle-class children; 40 percent of their comments about the poorer children were negative, compared to 20 percent of their comments about the middle-class children. And the teachers were even more likely to talk negatively about black children than white children, 43 percent to 17 percent.

Leacock then went on to relate the children's IQ scores to the teachers' feelings toward them. IQ scores of the middle-income children, both black and white, were clearly related to the positive attitudes of their teachers. This relationship did not hold for the low-income children; in fact, it was reversed. That is, lower-income children who had *higher* IQs tended to have teachers who viewed them *negatively* and this was especially true for lower-income children who were black. The children who surpassed their teachers' expectations got resentment and complaints for their pains.

Thus children who are both black and lower-income have a double handicap. And this result cannot be attributed to white teachers' bias; both of the teachers of the black children were themselves black. The prejudice of stunted expectations knows no race barrier.

We still do not know exactly how the Pygmalion effect works. But we know that often it does work, and that it has powers that can hinder as well as help the development of others. Field and experimental studies are beginning to isolate the factors that will give some insight into the process. Such awareness may help some to create their Galateas, but it will also give the Galateas a chance to fight back.

To obtain reprints of this article, see page 102.
For a taped discussion with the author about the implications of his research, see page 102.

DEFENDANT'S EXHIBIT NO. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

versus **NO. WC 6637**

CALHOUN COUNTY BOARD OF EDUCATION, ET AL,
Defendants

ORDER

This cause having come on for hearing on the motion of the United States for supplemental relief, from the evidence submitted, and after statements and arguments of counsel, the court having stated its findings of fact, conclusions of law, and rendered its decision on the said motion, all as will be more fully shown by the reporter's notes of said proceedings which have been transcribed and filed in this case; it is

ORDERED:

That the order of this court of August 26, 1966, is amended as follows:

I.

PUPIL ASSIGNMENT

(a) For the 1968-69 school year, grades 1-3 inclusive shall be discontinued at the North Calhoun Attendance Center and the South Calhoun Attendance Center and all pupils enrolled in such grades who were previously scheduled to attend such attendance centers shall be reassigned to the Bruce School, the Calhoun City School, and the Vardaman School in accordance with the geographic attendance zones as either now exist or may be promulgated by the County Board for those three schools. In the promulgation of any new attendance zones, race shall not be considered, but only residence of the children involved. The first three grades in the North Calhoun Attendance Center and the South Calhoun Attendance Center shall be discontinued effective at the opening of school for the 1968-69 school year.

(b) For the school year 1969-70, grades four, five, and six of the North and South Calhoun Attendance Centers shall be discontinued and the students of said grades shall be assigned to the Bruce, Calhoun City, and Vardaman Elementary Schools in accordance with the attendance zones, unrelated to race, as they now exist or may be promulgated by the County Board for these schools.

(c) Not later than June 1, 1969, the defendants shall submit a written report to this court embracing, among other things, plans for the complete and total

desegregation of all remaining grades within the school system. Said total and complete desegregation shall occur for the school year 1970-71 unless compelling reasons to the contrary can be shown.

II

PROTECTION OF PERSONS EXERCISING CHOICE

Within their authority school officials are responsible for the protection of students and other persons affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. If officials of the school system are not able to provide sufficient protection, within or outside of their schools, they shall seek whatever assistance is necessary from other appropriate officials.

III

TRANSFERS

(a) *Majority to Minority Transfers.* Commencing with the 1968-69 school year, any student assigned to a school where students of his race are in a majority shall have the right to transfer to any other school serving his grade level within the system where students of his race are in a minority.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

IV

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the employment, re-employment, hiring, re-hiring, promotion, demotion or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals and staff members shall be employed and re-employed for schools so that the faculty and staff is not composed exclusively of members of one race. The tenure of teachers in the system shall not be used as an

excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher employment and re-employment at any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *1968-69 Faculty Re-assignment.* For the school year beginning September 1968 those faculty members scheduled to teach grades one through three at the North Calhoun and South Calhoun Attendance Centers shall be re-assigned to the Bruce, Calhoun City, and Vardaman Attendance Centers in such manner as the school board may determine.

(c) *1969-70 Faculty Re-assignment.* For the school year beginning in September 1969 as grades four, five and six in the North Calhoun and South Calhoun Attendance Centers are discontinued, the faculty members scheduled to teach said grades four through six shall also be re-assigned to the Bruce, Calhoun City, and Vardaman Attendance Centers in such manner as the school board may determine.

(d) *Additional 1969-70 Faculty Requirements.* In addition to the two measures of faculty desegregation ordered above, defendants shall, not later than September 1969, take further positive and affirmative steps of faculty desegregation by hiring teachers of a race opposite from that of the race of the predominant number of students in each of the five high schools in the county; provided, however, that at least one mem-

ber of the minority race, when judged by the race of the predominant number of students, shall teach in each one of said high schools.

(e) *Dismissals.* Teachers and other professional staff members may not be discriminatorily dismissed, demoted, or passed over for re-employment or promotion, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five days after such dismissal, demotion, etc., as proposed.

V

TRANSPORTATION

Commencing with the 1968-69 school year, the defendants shall operate a unitary integrated school bus transportation system with school buses serving geographic areas of the school district and not specific schools, and entirely without regard to race.

VI

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualifications or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student, except that such transferees shall be subject to long-standing, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VII

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII

REPORTS TO THE COURT

On or before June 1, 1969, and June 1 of each subsequent year thereafter until the further order of this court, the defendants shall submit in writing a report to this court containing, among other things, the following information:

(a) The number of students by race in each grade of each school within the district for the school year closing and the anticipated number of students by race in each grade of each school for the next ensuing school year.

(b) For each teacher employed by County Board for the 1968-69 school year and each subsequent school year thereafter, the race, grade or course taught, and the school to which such teacher is assigned under this order.

(c) The number of faculty vacancies by school which have occurred and have been filled by defendants since the last prior report submitted to this court. The race of each teacher employed to fill such vacancy shall be shown as well as whether such teacher is newly employed or was transferred from another school in the school system. Faculty transfers within the system shall also be shown, and the number of faculty transfers within the system, including the schools from which such transfers were made and the schools to which such transfers were made shall be shown. The number and race of faculty members of each school for the forthcoming school year shall likewise be included in such report.

(d) A map or maps showing the location or place of residence of all students, indicating race and school to which assigned.

It is further ORDERED that a certified copy of this order be mailed by the Clerk of this Court by certified mail to Guy A. Gulledge, Superintendent of Education, Pittsboro, Mississippi, and to T. A. Beckett, President, RFD Bruce, Mississippi, R. B. Chandler, Calhoun City, Mississippi, R. V. Mallory, Slate Spring, Mississippi, Elmer Collins, RFD Bruce, Mississippi, and James L. Williams, RFD Vardaman, Mississippi, members, Board of Education of Calhoun County, Mississippi, in order to accomplish service hereof, and such mailing shall be noted on the docket.

It is further ORDERED that the court shall retain jurisdiction of this cause for the entry of all future or-

ders as may be necessary and proper to insure the establishment of a unitary nonracial school system in the defendants' school district.

This, 9th day of August, 1968.

/s/ WILLIAM C. KEADY
Chief Judge
United States District Court

DEFENDANT'S EXHIBIT NO. 5

October 9, 1972

Hon. David L. Norman
Assistant Attorney General
General Civil Rights Division
United States Department of Justice
Washington, D. C. 20530

Re: Calhoun County School District
DLN: RLC:
DJ169-40-17

Dear Mr. Norman:

It might be that you are not in position to answer the inquiries that I am making in this letter, and if so, that will be perfectly all right with me and the school board.

The situation is that we have learned since entering into contracts with certain of the teachers in the School District, that they have children that they are sending to private schools. We have advised them that they cannot expect us to renew their contracts with them when they come up for renewal, which is normally in March, 1973. We have created quite a heated controversy in the community by so doing. All of the teachers, of course, are white. We are not absolutely positive at this point, but our best information is that there are nine children involved.

I advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their action was correct. The board also feels that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children.

If you are permitted to give me your opinion in this matter, it would be greatly appreciated. It so happens that one of the teachers so involved is the wife of a local attorney, and he has been quite verbal in his objections in reference to this matter. I understand from others, and purely by hearsay, that he is threatening to sue us if we do not renew the contract with his wife.

Very truly yours,

Paul M. Moore

PMM/vwn

DEFENDANT'S EXHIBIT NO. 6

State of Mississippi

Office of Secretary of State
Jackson

I, Heber Ladner, Secretary of State of the State of Mississippi, do hereby certify that the within and attached is a true and correct copy of THE CHARTER OF INCORPORATION OF "CALHOUN EDUCATION FOUNDATION CORPORATION,"

the original of which is now a matter of record in this office.

SECRETARY OF STATE
STATE OF MISSISSIPPI

Given under my hand and Seal of Office this the 18th day of September, 1973.

Heber Ladner
Secretary of State

BOOK 170 PAGE 152

State of Mississippi

EXECUTIVE OFFICE

JACKSON

The within and foregoing Charter of Incorporation of

CALHOUN EDUCATION FOUNDATION CORPORATION

is hereby approved.

In testimony whereof, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed this 20th day of August A. D., 1968.

John Bell Williams
Governor

By the Governor

Heber Ladner
Secretary of State

Be it remembered that at a meeting of Calhoun Education Foundation Corporation, begun and held at Calhoun City, Mississippi, on the 20th day of August, A. D., 1968, the following, among other, proceedings were had and done, to-wit:

> On motion made, seconded, and unanimously adopted, Kenneth A. Hardin, D. E. Nolan, Mrs. Billy Burt Hamilton, and Hugh S. Hardin were authorized, empowered, and directed to make application for a Charter of Incorporation as a non-profit corporation under the laws of Mississippi, in the form as attached hereto.

Certified a true copy as the same appears on the minutes of said organization.

/s/ DURRELL LUNCEFORD
DURRELL LUNCEFORD
Presiding Officer

Attest:
/s/ MRS. JOE WIGGS
MRS. JOE WIGGS
Secretary

THE CHARTER OF INCORPORATION OF CALHOUN EDUCATION FOUNDATION CORPORATION

1. The title of said company is: Calhoun Education Foundation Corporation.

2. The names and post office addresses of the incorporators are:

   Kenneth A. Hardin
   Calhoun City, Mississippi 38916

   D. E. Nolan
   Pittsboro, Mississippi 38951

   Mrs. Billy Burt Hamilton
   Vardaman, Mississippi 38878

   Hugh S. Hardin
   Vardaman, Mississippi 38878

   The above incorporators are adult resident citizens of Mississippi.

3. The domicile of the Corporation in this State is: Calhoun City, Mississippi 38916

4. The Corporation is: Non-profit and no shares of stock are to be issued, as authorized by the provisions of House Bill 1335 of the 1968 Regular Session of the Mississippi Legislature. This corporation is created, shall act and operate as a school, institution of learning and a charitable corporation.

5. The period of existence is: Perpetual.

6. The purposes for which the corporation is created, not contrary to law, including a statement of the rights and powers that are to be exercised by said corporation, which said rights and powers shall be limited to those reasonably necessary to accomplish the stated purpose of the association being incorporated. Subject to the foregoing, the purposes and powers of this non-profit school, institution of learning and charitable corporation are:

   (a) To organize, own and operate schools, colleges and other educational institutions for the education of youth that they may be taught complete and adequate proficiency in all good learning; to adopt and amend bylaws for this corporation by a majority of the members present at any regular or special meeting thereof to govern the affairs of the corporation.

   (b) To fix the curricula of such schools, colleges and other institutions and the standards and qualifications for admissions of pupils and students and for their retention in such schools, colleges or other institutions of learning, and to reject any applicant for admission for any cause deemed sufficient to the Corporation. It being the intent and purpose of the Corporation that no person shall have a right to be admitted to such schools, colleges or other institutions of learning, but that any

person so admitted or retained shall be admitted or retained solely in accordance with the will of the members of this corporation and not otherwise.

(c) To select and employ such principals, teachers, professors, instructors and other employees as the corporation may deem necessary and advisable and provided that no person shall have a right to be employed or retained as a principal, teacher, professor, instructor or other employee but any such employment or retention is solely at the will and pleasure of the Corporation and may be denied or terminated at the will of the Corporation.

(d) To prescribe, charge and collect such fees as the Corporation may find necessary and proper to be collected from pupils and students and to vary such charges in individual instances as may be determined by the Corporation so that it shall not be necessary for all of the pupils or students in the same grade or class to pay the same fees or tuition but such fees or tuition to be charged in each case is solely within the discretion of the Corporation and at its own will and pleasure. This shall not prevent schedules of estimated fees or rates of tuition from being set and advertised as matters of information only, but the Corporation shall never, in any individual case, be bound by such schedule of estimated charges.

(e) To acquire by purchase, gift or in any other lawful manner such real and personal property as is requisite and necessary for the carrying out of the purposes for which this Corporation is formed. But the acceptance of any gift or grant from any public body or governmental unit which would be held to affix a public character upon this Corporation or render its internal management subject to the regulation of any public agency or court shall be ultra vires and void.

(f) To sell, mortgage or in any other lawful manner dispose of its money, choses in action, real or personal property as seems good to the Corporation, except that no properties or dividends shall be paid to the members of the Corporation or to any person, firm or Corporation for them.

(g) To have and use a corporate seal, to sue and be sued, complain and defend in its corporate name, to exercise generally such powers as are by law conferred upon corporations not for profit; to elect officers, directors, agents and employees as provided in the bylaws.

7. The Corporation shall not be required to make publication of this Charter. It shall issue no shares of stock and shall divide no dividends or profits among its members. Upon dissolution of this Corporation any remaining assets shall be distribut-

ed for one or more of the exempt purposes specified in Section 501 (c) (3) of the Internal Revenue Code of the United States. The by-laws of the Corporation shall provide the requirements for membership. Expulsion shall be the only remedy for non-payment of dues. Each member shall have one vote in the election of all officers. The loss of membership by death or otherwise shall terminate all interest of a member in the Corporate assets. There shall be no individual liability against the members for Corporate debts, but the entire Corporate property shall be liable for the claims of creditors.

SIGNED at Calhoun City, Mississippi, this the 22nd day of August, A. D., 1968.

/s/ KENNETH A. HARDIN
KENNETH A. HARDIN
/s/ D. E. NOLAN
D. E. NOLAN
/s/ MRS. BILLY BURT HAMILTON
MRS. BILLY BURT HAMILTON
/s/ HUGH S. HARDIN
HUGH S. HARDIN

STATE OF MISSISSIPPI
COUNTY OF CALHOUN

PERSONALLY appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named KENNETH A. HARDIN, D. E. NOLAN, MRS. BILLY BURT HAMILTON, and HUGH

S. HARDIN, who acknowledged that they executed the foregoing instrument on the day and year therein mentioned.

GIVEN under my hand and official seal of office on this 22nd day of August, 1968.

/s/ NANCY M. SWINDOLL
NOTARY PUBLIC

My Commission Expires: May 31, 1971.

(SEAL)

Received at the office of the Secretary of State, this the 23 day of Aug., A. D., 1968, together with the sum of $20.00 deposited to cover the recording fee, and referred to the Attorney General for his opinion.

/s/ HEBER LADNER
SECRETARY OF STATE

Jackson, Miss.,
August 28, 1968

I have examined this _____ Charter of incorporation, and am of the opinion that it is not violative of the Constitution and laws of this State, or of the United States.

/s/ JOE T. PATTERSON
ATTORNEY GENERAL.
/s/ [ILLEGIBLE]
Assistant Attorney General.

DEFENDANT'S EXHIBIT NO. 6

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

NOV. 6, 1972

[EMBLEM]

DLN: RLC: 1 r
DJ 169-40-17

Mr. Paul M. Moore
Attorney at Law
Calhoun City, Mississippi 38916

Dear Mr. Moore:

This is in reply to your letter of October 9, 1972, requesting an opinion on the legality of the school board's actions in advising teachers with children in private schools not to expect renewal of their contracts. I apologize for the delay in responding.

Although the Department of Justice is authorized by law to render legal opinions only to the President and the heads of the executive departments, we also have the responsibility to enforce the court orders in this case. Those orders would certainly not preclude the school board from taking the action described in your letter. Indeed, as your letter correctly notes, the court, in its ruling from the bench on August 7, 1968, made

several references to the board's obligations to take "positive and affirmative steps." As was pointed out by Chief Justice Berger in *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1972), "school boards that operated dual school systems are charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." See also, *Green* v. *County School Board*, 391 U.S. 430, 437-438 (1968).

The comments made above do not purport to answer any "due process" or "First Amendment" issues which may be raised in this matter. We appreciate your interest in writing this Department.

Sincerely,
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division
/s/ ROSS L. CONNEALY
ROSS L. CONNEALY
Attorney
Education Section

DEFENDANT'S EXHIBIT NO. 7

Excerpt from "The Monitor-Herald", June 30, 1966
(Picture Illegible)

CITIZENS COUNCIL COUNTY OFFICERS ARE ELECTED

Mr. Otis Vance of Eupora, Rt. 4, Springhill community, has been elected President of the newly organized Calhoun County Chapter of the Citizen's Councils of America.

Vice-President of the group is Mr. Homer Hill of Pittsboro. Mr. John Hughes of Bruce is serving as the Secretary-Treasurer.

Heading the four main committees of the Council are Mr. E. L. Steele of Ellard community, Membership and Finances; Dr. L. A. Goudelock of Bruce, Public Affairs; Miss June Murphree of Calhoun City, Information and Education; Atty. Bill Gibson of Bruce, Legal Advisory.

The Board of Directors includes the above named officers and committee chairmen and the following:

Messers Harry Denton, Everette West, Jr. and James E. Sprayberry all of Slate Springs; W. J. Logan, Joe Longest, Lee Jenkins, T. A. Beckett, Jr., all of Bruce; Robert E. Hill, Bill Bryant, Boyce B. Brummett, all of Pittsboro; E. L. Steele, Rt. 2, Bruce; Carl Denton, Kent

Bingham, Slate Spring; James Sims, Rt. 1, Calhoun City; W. H. Brasher, Bruce Route; Roy Mitchell, Vardaman; Fred Weeks, E. W. Quillen, Max Jenkins, J. W. Baker, Jr., all of Bruce; Max E. Baker, Charles R. Baker, Otis Hood, all of Calhoun City; Egbert Chrestman of Pittsboro; William B. Griffin of Rt. 2, Calhoun City.

CERTIFICATE OF CLERK

I, the undersigned Chancery Clerk in and for Calhoun County, State of Mississippi, and having in my official custody the official copies of all newspapers published in Calhoun County, Mississippi, including official copies of the Monitor-Herald, a newspaper published in and of general circulation in Calhoun County, at Calhoun City, Mississippi, do hereby certify that the attached is a true, correct and exact copy of an article appearing in the issue of the Monitor-Herald, published as aforesaid, dated June 30, 1966, and appearing in the official copies of said newspaper on file in my office in volume entitled "MONITOR-HERALD, 1966", being the bound volumes of all Monitor-Heralds published for said year of 1966.

I further certify that said newspaper is kept and maintained in my office as the official publications of said Monitor-Herald in response to the requirement of Section 1260, Mississippi Code 1942, Recompiled.

Given under my hand and official seal of office, this the 11th day of October, 1973.

/s/ J. S. EASLEY
Chancery Clerk
/s/ MRS. R. L. STARKS
D.C.

(SEAL)

Excerpts from "The Monitor-Herald", July 28, 1966

HARRISON TELLS CALHOUN FOLKS ABOUT COMMUNISM

Tuesday night Mr. D. L. Harrison, Principal of the Calhoun City High School, spoke at an open meeting of the Calhoun County Citizens Council held at Pittsboro in the Courthouse. His topic was Communism.

Stating that the Communist philosophy is materialistic, Mr. Harrison pointed out that the Communists believe that nothing exists except matter and that matter is self-sufficient and that they believe there is no God. He explained that the Communists say they will mold a world & mankind by the direction of the hand & the mind of man and will produce here on earth a "heaven". He said that Communism claims to be a classless social system with full social equality of all members of society.

"Communists use promises to gain their ends," he said, "Using both a negative and a positive approach". In the negative approach the Communists attempt to produce a deep-seated contempt against the present system, as they are now doing in the South, he said. Their positive approach centers around joining forces to control the world in which "man will find a heaven on earth".

The Communists also claim that under their system all economic ills will pass away, but, Mr. Harrison

pointed out, "They would starve today in Russia if we did not feed them". He stated, "They claim capitalism exploits labor, but today in Russia for a day's work, a laborer can buy 3 pounds of butter, while in the United States a day's labor is equal to 23 pounds of butter". Mr. Harrison explained that in Russia today expenditures for food take one-half of what each man earns.

He said that Communism does appeal to certain people because of several reasons: for some wrong done them; from a sense of inadequacy; a lack of faith in God; those who are short-sighted and want something for nothing now without training and without work and the youth who see it as a means of improving mankind.

"But," he said, "The Communists fail to point out the countless thousands who have died at the hands of Communists, in purges, of the untold misery of the people in Russia and their complete lack of freedom".

Mr. Harrison said that we must fight Communism, not with violence on the home front and not by sitting back and taking no part in any way, but by keeping our feet firmly on the ground and one foot in the door. He said that we must have domestic tranquility. In order to have this we must back our law enforcement officers who try to carry out the laws.

"We all feel alike here in Calhoun County", he explained, "But some of us have different ideas of solving our problems". He called on the people to "hold our heads", remain calm, "have faith with our neighbors and friends".

"The tide is turning even now. Our President is turning a big Texas ear to the ground and conservatives are becoming popular all over the United States", he said, and pointed out the political changes in many states such as California where a conservative is giving liberal Governor Pat Brown the campaign of his life.

He closed his address with two verses from the Bible: John 14:27 "Peace I leave with you, my peace I give unto you: not as the world giveth, give I unto you. Let not your heart be troubled, neither let it be afraid" and John 15:17: "These things I command you, that ye love one another".

The Council will meet Tuesday, August 23. The program will be announced later.

CERTIFICATE OF CLERK

I, the undersigned Chancery Clerk in and for Calhoun County, State of Mississippi, and having in my official custody the official copies of all newspapers published in Calhoun County, Mississippi, including official copies of the Monitor-Herald, a newspaper published in and of general circulation in Calhoun County, at Calhoun City, Mississippi, do hereby certify that the attached is a true, correct and exact copy of an article appearing in the issue of the Monitor-Herald, published as aforesaid, dated July 28, 1966, and appearing in the official copies of said newspaper on file in my office in volume entitled "MONITOR-HERALD, 1966", being the bound

volumes of all Monitor-Heralds published for said year of 1966.

I further certify that said newspaper is kept and maintained in my office as the official publications of said Monitor-Herald in response to the requirement of Section 1260, Mississippi Code 1942, Recompiled.

Given under my hand and official seal of office, this the 11 day of October, 1973.

/s/ J. S. EASLEY
Chancery Clerk
/s/ MRS. R. L. STARKS
D.C.

(SEAL)

Excerpts from "The Monitor-Herald", August 25, 1966

SEN. YARBROUGH SPEAKS AT CITIZENS COUNCIL HERE

Senator George Yarbrough of Holly Springs, who is President Pro-Tempore of the Mississippi Senate, addressed the Calhoun County Citizens Council at Pittsboro Tuesday night.

Sen. Yarbrough who also serves on the Board of Education and Higher Learning in the State, recounted some of the trouble the Board has faced with agitators at some of the colleges in the state. He said that the racial agitators who invaded Alcorn A & M

College at Port Gibson are being sued by the Board for damages to buildings and facilities in the amount of $1 million.

Concerning the Citizens Council itself, Sen. Yarbrough said, "It is formed to do what is lawful and to act within the framework of the law". He explained that the Citizens Council is the only organization in the nation which has organized the white people to maintain racial integrity and combat the problems presented by the Negro groups and agitators. The Senator continued: "When your trouble comes, if you are already organized, with plans made, you can take care of the situation much easier."

He said that 20% of the dues go to the Citizens Council forum, which is the largest in the nation, and which is the only one that is educating the people in other parts of the nation to the dangers of integration.

"If we are going to have a better community, county and state, we must organize, stay together, pay our dues and do all things in a way that is right."

He concluded, "A quitter never wins and a winner never quits".

Mr. Bradshaw, who is a field worker with the state Council, encouraged the people by saying we cannot voluntarily give up any ground and that the white people must stand firm. "If they get anything from us, let them get it through the courts", he said.

He asked the Local Council to set up plans to get all eligible white people in Calhoun County registered to vote. The last estimate of those eligible but not registered is over 1,000.

The next meeting of the Calhoun Council will be held on the fourth Tuesday night in the Pittsboro court house.

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Chancery Clerk
/s/ MRS. R. L. STARKS
(SEAL) D.C.

Excerpts from "The Monitor-Herald", October 27, 1966

LEWIS HOLLIS SAYS COUNCIL
IS ANSWER FOR THE SOUTH
by Atty. George Swindoll

Mr. Lewis Hollis of Jackson, Miss., who is executive director of the Citizens' Council of America, spoke to the Calhoun County Citizens' Council in Pittsboro Monday night.

Mr. Hollis stated that the basic objective of the Citizens' Council is victory for State's Rights and racial integrity. The Council, he said, must resist the trend of centralizing government to the extent that it destroys the significance of the individual.

He noted that recent developments strongly indicate that popular opinion across the nation believes in race integrity and State's Rights and he also pointed to the nation-wide back-lash against the so-called civil rights movement. He emphasized the battle that liberals are facing who find themselves running for re-election at present. Mr. Hollis stated that the

massive movement toward private schools indicates a refusal of the people to submit to federal bureaucracy.

The plan, according to Mr. Hollis, in obtaining victory, is to provide appropriate publications, professional staff and strong membership, along with emphasis on the individual member.

Mr. Hollis said, "We are engaged in a relentless struggle for power, so the job for each of us is to keep striving toward the point where the balance of power leans toward the responsible element in this nation. We must concentrate our power in politics and an educational system, free of race-mixing."

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/s/ J. S. EASLEY
Chancery Clerk
/s/ MRS. R. L. STARKS
D.C.

(SEAL)

Excerpt from "The Monitor-Herald", June 15, 1967

CITIZENS' COUNCIL OFFICIALS SAY EDUCATIONAL SYSTEM MAY COLLAPSE

The Calhoun County White Citizens Council met at Pittsboro on Thursday night, June 8 and heard three speakers, Mr. Bradshaw, a field worker for the state organization; Dr. Medford Evans, Assistant Editor of the Citizens' Council magazine, and W. J. Simmons, Editor of "The Citizen".

Judge Tom Brady was scheduled to appear but was unable to attend at the last minute.

The speakers told a small group of Calhoun people that the object of the Citizens' Council is patriotism and the preservation of racial segregation.

Dr. Evans said that the means by which the group hopes to achieve their object is by two types of action: Education and Politics.

He predicted the collapse of the public school system in the state with the arrival of full forced integration. He pointed out that it will be necessary for the people to have private schools and said this is the job for the Council.

"America's major universities, including the University of Mississippi, are tinged deep red and are committed to the course of complete social revolution," the former professor at Ole Miss said, in explaining that students are subjected to "brainwashing" while attending some colleges.

He said, "If America is to be saved, the educational system must be changed".

He concluded, "Students need to be taught reverence for God, patriotism to country and racial integrity" through the private schools.

Mr. Simmons, who was introduced by Calhoun's Representative George Swindoll, said that the reason why the Citizens' Council has spread to almost every state in the nation is because "its ideals are right".

He discussed the political setup in this nation, and pointed out that the possibility of a change in politics for this nation is here with the leadership of Alabama's former Governor George Wallace. He said, "Gov. Wallace is an inspiring leader around whom we can rally." He further stated that the Council is working in all of the states at present with the intention of getting Wallace on the ballot and give the American people "a real choice".

He said, "We can now hope and even be optimistic".

Dr. L. A. Goudelocke of Bruce, the President of the county organization, presided over the meeting, during which a number of people joined.

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Chancery Clerk
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D.C.

(SEAL)

Supreme Court, U. S.
FILED
OCT 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-503

BILLY D. COOK, LOULA JUANITA MILTON ADAMS, MRS. W. P. WRIGHT, *Petitioners*

v.

ROGER W. HUDSON, JOHN BURT, JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER, N. F. HANSON, BOARD OF EDUCATION, CALHOUN COUNTY, MISSISSIPPI, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855 (App. 30a of Petition). The opinion of the Court of Appeals for the Fifth Circuit is reported at 511 F. 2d 744 (App. 2a of the Petition). The denial

of rehearing by the Court of Appeals is reported at 515 F. 2d 762 (App. 1a of Petition).

II.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

III.

QUESTION PRESENTED

Whether a rural southern public school board, acting under a Court ordered legal and affirmative duty to eliminate racial discrimination "root and branch" from its school system, be compelled to reemploy classroom teachers who send their own children to a racially discriminatory, segregated, all white, private secular academy.

IV.

CONSTITUTIONAL PROVISIONS AND REGULATION

The constitutional provisions and regulation involved are adequately set forth in the Petition.

V.

STATEMENT OF THE CASE

Prior to the 1973-1974 school year, Petitioners Billy D. Cook, Loula Juanita Milton Adams, and Mrs. W. P. Wright, were employed as teachers in the public school system of Calhoun County, Mississippi. On August 9, 1968, the United States District Court for the Northern District of Mississippi entered an Order directing the immediate desegregation of the Calhoun County

schools. The Calhoun County school board was further under a duty to take affirmative action to eliminate racial discrimination from the schools within its district "root and branch" and to completely abolish the dual system and create a unitary desegregated school system. On August 28, 1968, twenty (20) days after the desegregation Order was entered, various citizens of Calhoun County, Mississippi, incorporated the Calhoun Educational Foundation Corporation for the purpose of establishing a private academy (R. Vol. II, page 72; Respondent's Exhibit 6). The Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, hereinafter referred to as Calhoun Academy, is a racially discriminatory, all white, private school.[1] Furthermore, Petitioner Cook, the present Headmaster of the Calhoun Academy, testified that not only were no blacks enrolled in the Calhoun Academy and that none had ever applied, but furthermore, if a black did apply for admission to Calhoun Academy, he would not be admitted. (R. Vol. I, pages 75-76). This testimony is uncontradicted. The District Court, as a

[1] The Calhoun Academy, along with other Mississippi private academies, lost its tax exempt status with Internal Revenue Service as a result of the decision of the United States District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971). The Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, presently does not have tax exempt status under Section 501(c)(3) of the Internal Revenue Code as a result of their failure to adopt racially non-discriminatory admissions policies. In addition, the Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, has not qualified to receive free textbooks from the State of Mississippi pursuant to *Norwood* v. *Harrison*, 93 S. Ct. 2804 (1973). Also, substantial financial support to the Calhoun Academy is received from the Calhoun County Citizens Counsel (R. Vol. II, page 73, Respondent's Exhibit 7; R. Vol. II, pages 25-30, Respondent's Exhibit 1). (Also, see opinion of District Court 365 F. Supp. 855 at 857, n. 1).

finding of fact, found the Calhoun Academy to be a racially discriminatory, all white, private school, similar to other so called "segregation academies," established throughout the State of Mississippi in the wake of public school desegregation to provide a haven for segregated education.

In November 1972, after deliberate consideration, the Calhoun County Board of Education adopted a policy whereby prior to the employment of a new teacher or the reemployment of an existing teacher, the children of any such teacher, *if living in Calhoun County, Mississippi,* would be required to attend the public schools of said Calhoun County, or such teacher would not be employed or reemployed. There are no religious or parochial private schools in Calhoun County. Furthermore, the only private school in Calhoun County is the Calhoun Academy (R. Vol. I, pages 209-210; Vol. I, pages 21-22). School board members and school officials testified that when the policy was adopted the private school which was the impetus of the adoption of the policy was the Calhoun Academy, as such was the only private school in Calhoun County (R. Vol. II, pages 21-22). Further, the District Court found, as a finding of fact, that the school officials, teachers and the community knew that the policy was to apply to the Calhoun Academy. Respondents further testified that because some of the public school teachers had their own children enrolled in the Calhoun Academy, much controversy among parents, teachers and students resulted therefrom (R. Vol. II, pages 23-24). The Respondents, in an effort to comply with their affirmative duty to eliminate racial discrimination "root and branch" from the Calhoun County public schools, and for the further purpose of assuring the complete and

total support, loyalty and dedication of the teachers and the Calhoun County public schools to a desegregated public school system, and to further the best interests of the children in the Calhoun County schools, and to maintain teacher effectiveness and performance, adopted the above policy. (R. Vol. I, pages 28, 154-155, 182; R. Vol. II, pages 18, 22, Respondent's Exhibits 5 and 6).

During the 1972-1973 school year, the Petitioners were employed as teachers in the Calhoun County public school system. Each of the Petitioners had children of school age, who they sent to the Calhoun Academy, a racially discriminatory, all white, private school in Calhoun County. Prior to the end of the 1972-1973 school year, the Petitioners were advised that if their children were enrolled in the Calhoun Academy for the coming school year, they would not be reemployed by the school board. Accordingly, the Petitioners were not rehired for the 1973-1974 school year.

Two experts in the field of educational psychology testified, uncontradicted, that the action taken by the Calhoun County School Board is reasonably and significantly related to the job performance and effectiveness of a classroom teacher, and further, that said action on the part of the school board is imperative if the best interests of the school children attending the public schools of Calhoun County, Mississippi, are to be served. These experts expressed the opinion that the children in the classes of a teacher sending his own child to a racially discriminatory, all white, private school, would perceive the teacher as rejecting them and derive a sense and feeling of inferiority. A general negative educational atmosphere would prevail. These educational psychology experts further testified that

the expectations of the teacher of the performance of the public school children, would necessarily be lower, and as a result thereof, the public school children in their classes would not achieve their highest educational level, therefore effecting the classroom effectiveness and performance of the teacher. (R. Vol. I, pages 106-113; 128-136; 193-194).[2]

Although the Petitioners gave various reasons for sending their own children to the Calhoun Academy, these reasons were clearly impeached on cross-examination and it is clear that the reason that the Petitioners sent their children to the Calhoun Academy was to keep them from attending the integrated public schools of Calhoun County, Mississippi. One of the Petitioners testified that her child had a speech problem and that she sent her child to the Calhoun Academy for this reason. (R. Vol. I, page 42). However, it was shown at the trial of this cause that the Calhoun Academy had no speech therapist, whereas the Calhoun County schools had several, and in particular one which was black. (R. Vol. I, pages 48-51; 62; 63; 156-157). Another Petitioner testified that she was not dedicated to a desegregated school system. This particular Petitioner further testified that she spent substantial amounts of time and energy involved in the affairs of Calhoun Academy, such as fund raising and parent-teacher events. (R. Vol. I, pages 91; 94-98). The third Petitioner, Cook, testified that the reason that he had sent his child to the Calhoun Academy was that he preferred not to have his child on the same campus with him. (R. Vol. I, pages 64; 65). However, after the Petitioner Cook was not rehired by the Calhoun County public schools, he became the Headmaster of the Calhoun Academy, and his child is presently attending school on the same campus with him. (R. Vol. I, pages 75-76; 80-81; 83; 86-87). The District Court, as a finding of fact, found that the dominant, if not sole reason why each of the Petitioners enrolled their children in the Calhoun Academy was to avoid the desegregated public school system in Calhoun County, Mississippi. (365 F. Supp. at 858).

[2] The testimony of the educational psychologists and the findings of the District Court in this regard parallels those of the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and are remarkably similar to those in *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143 at 153-157, 161-162 (W.D. Michigan 1973).

The District Court, after extensive evidentiary hearings in the subject matter, entered its Order denying the Petitioners the relief which they sought and dismissing their Complaint against the Respondents. Petitioners then prosecuted an appeal in the United States Court of Appeals for the Fifth Circuit, where the District Court's action was affirmed. A petition for rehearing en banc was denied.

VI.

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW IS CLEARLY CORRECT

a. Balancing of Interest and the Equal Protection Claim

The issue in this case, as recognized by the District Court and the Court of Appeals, is an extremely limited one. Irrespective of the rhetoric propounded by the Petitioners, this case only presents one precise issue. Must the Calhoun County school board, in its effort to fulfill its Court ordered affirmative duty to eliminate racial discrimination "root and branch" from

its school system,[3] be compelled to reemploy these three Petitioner teachers, who by sending their own children to a racially discriminatory, segregated, all white, private secular academy, cast a pervasive influence on the educational process of the public schools of Calhoun County and infringe upon the equal opportunity of the black school children in that system? In balancing the interests of these three individual Petitioner teachers against the interests of the state, the board of education of Calhoun County, the public school system of Calhoun County, and the children attending the school system, Petitioners have failed to recognize that First Amendment rights of teachers are applied in light of the *special* characteristics of the school environment. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969). It is the special characteristics of the school environment, particularly where a school board, as here, is under a Court ordered affirmative duty to eliminate racial discrimination from its school system "root and branch," that validates the questioned action of the school board. None of the cases cited by Petitioners involve school boards under affirmative duties to eliminate racial discrimination from their schools. As recognized in *Green* v. *Connallly,* 330 F. Supp. 1150 (D.C. 1971), "[t]here is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional grounds . . . That government interest is dominant over other constitutional interests to the extent there is a complete and unavoidable con-

[3] *Green* v. *County School Board,* 391 U.S. 430 (1968); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *United States of America* v. *Calhoun County Board of Education,* No. WC 6637, N.D. Mississippi, presently pending before the District Court.

flict." (330 F. Supp. at 167; emphasis added). As *Green* recognized the constitutional strength of the government's interests in preventing even private racial discrimination, and because of the special characteristics of the environment of the public schools, the action of the school board as applied to these three Petitioners, must be viewed in full context of elimination of all forms of racial discrimination for the public schools of Calhoun County. As the action of the school board is but a tool of eliminating racial discrimination from the public schools of Calhoun County, it becomes clear that the First Amendment rights of the Petitioners, if any, coming in conflict with this action must yield. This Court recognized in *Norwood* v. *Harrison,* 413 U.S. 455 (1973) that:

> Under Brown v. Board of Education . . . discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to define groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregating is desirable in education. (413 U.S. at 469)

A public school teacher, who sends his children to such private school, "manifests, by (his) own actions" the same private belief to his public school students, thereby exerting a pervasive influence on the educational process of the public schools and detrimentally reducing his effectiveness and performance as a teacher. "A sense of inferiority affects the motivation of a child to learn." *Brown* v. *Board of Education,* 347 U.S. at 494. Furthermore, as "[a] teacher works in a sensitive area in a classroom" . . . as "he shapes the attitude of young minds towards the society in which they

live . . ." the Respondents are compelled to be vitally concerned in this regard. *Adler* v. *Board of Education of New York City,* 342 U.S. 485 (1952). Racial discrimination in state operated schools is barred by the Constitution and "[i]t is also axiomatic that [they] may not induce, encourage or promote private persons to accomplish that which is constitutionally forbidden to accomplish." *Norwood* v. *Harrison, supra,* 93 S. Ct. at 2810. When viewed in this light, it becomes clear that the decision below is correct.

b. The Due Process Claim

Petitioners also contend that the policy and action of the Calhoun County School Board created an irrebuttable presumption which they attacked as violative of the due process clause. This contention is totally without merit. Even assuming that a presumption as that supposed by the Plaintiffs was created as a result of the action of the school board, it is clear from *Norwood* v. *Harrison,* 413 U.S. 455 at 469, and *Gilmore* v. *City of Montgomery,* 473 F. 2d 832 at 835 (5th Cir. 1973), that any such supposed presumption is valid. The recognition by this Court in *Norwood* v. *Harrison* of the pervasive influence of racially discriminatory schools on the public school system has previously been discussed and does not require reiteration here. Petitioners, while relying upon *Cleveland Board of Education* v. *LaFleur* and *Cohen* v. *Chesterfield County School Board,* 414 U.S. 632 (1974), in support of their contention, fail to recognize that the experts at the trial of the cases were in unanimous agreement as to the individuality of the ability of any particular pregnant woman to continue at work past any fixed date in her pregnancy. In this regard, it should be noted that the

undisputed testimony of the educational psychologists in this case is that the presence of a teacher who sends her own child to a racially discriminatory private school, would be perceived by the students of that teacher as a rejection and they would therefore derive a sense and feeling of inferiority. The expectations of the teacher of the performance of the public school children would be lower. The classroom effectiveness and performance of the teacher would be reasonably and significantly affected. In addition, in *LaFleur* and *Cohen* this Court based its ruling on the holding that the presumptions embodied in the regulations were "neither necessarily nor universally true." It should be recognized in this regard that that is not the circumstances of the case presently before this Court. (*Norwood* v. *Harrison, supra; Gilmore* v. *City of Montgomery, supra; Brown* v. *Board of Education, supra; Oliver* v. *Kalamazoo Board of Education, supra.*) Additionally, it is implicit in the *LaFleur* and *Cohen* opinions that had the regulations and policies of the school boards been shown to have a rational relationship to a valid state interest which served as the impetus of those policies, the "irrebuttable presumption" policy would not have applied.

B. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

A case remarkably similar to the incident one and embodying many of the same issues was *Keckeisen* v. *Independent School District,* 509 F. 2d 1062 (8th Cir. 1975), petition for cert. denied, 44 U.S.L.W. 3202 (1975), wherein the Circuit Court upheld a school board's regulation prohibiting marriages between administrators and teachers. In *Keckeisen,* as in the incident case, there was uncontradicted expert testimony

in favor of the policy. In *Keckeisen,* the Plaintiffs attempted to defeat the policy basing their claim upon infringement of the fundamental right to marry. The Court recognized the fallacy of this argument wherein it stated:

> The policy in question here does not deny the two people the right to marry; it only prohibits the employment of married couples in administrator-teacher situations. (509 F. 2d at 1065)

Likewise, in the present case, Petitioners seek to defeat the policy claiming it constitutes an infringement of their right to send their children to a private school. However, such is not the case. The action of the school board here does not deny these teachers the right to send their children to the private school; it only prohibits their employment if they do send their children to the racially discriminatory Calhoun Academy. Their right to send their children to a private school is not in issue here. As observed by Judge Coleman in the Court of Appeals opinion:

> Here, the teacher-appellants seek to defeat that public right by saying that because they have a right to send their children to private schools they also have the constitutionally guaranteed right to be employed in the public schools in defiance of the considered judgment of the school board that such a practice is not good for the schools which they have assumed an obligation to foster and maintain.
>
> I simply do not believe that the Constitution may be stretched so far.
>
> We are not here dealing in isolation with the rights of parents as to the education of their children. This is only a springboard from which teachers (who also happen to be parents) are trying to

> jump to the desired result. We are confronted with altogether different claims; we are asked to hold as a matter of constitutional law that they may *command* for themselves employment in a public agency in *defiance* of the declared public policy of that agency, a policy which could have no possible purpose other than to promote the unity of, and public confidence in, the public school system. In such a collision of interest, the asserted "parental right" must yield. On balance, concerned as we are with the general, discretionary power of school boards to manage public schools, the board policy should prevail and I see nothing in the Constitution to forbid it. (511 F. 2d at 749)

In *United States Civil Service Commission* v. *National Association of Letter Carirers,* 413 U.S. 548 (1973), this Court, while expounding upon *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), observed:

> "There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear[4] to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 564.
>
> "Neither the right to associate nor the right to participate in political activities is absolute in any event (citations omitted)." 413 U.S. at 567

In light of *Letter Carriers, United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and *Keckeisen, supra,*

---

[4] The importance of this statement to the present case should not be ignored. The record clearly reflects such a relationship between the Petitioners, the Calhoun Academy and the Citizens Council so as to make them willing symbiotic partners in the quest of racial segregation.

it is respectfully submitted that no important question of Federal law is present in this case.

CONCLUSION

Brown and its progeny have raised hopes that black students will at last obtain the equal educational opportunity in the public school which too long was denied them by law. These hopes seem substantial in light of this Court's mandate that school boards have an affirmative duty to eliminate racial discrimination "root and branch" from the public schools. However, this equal educational opportunity will be mocked if the lingering remnants of racial discrimination are allowed to remain in the public schools of Calhoun County. To set aside the action and policy of the Calhoun County school officials would, in effect, make the public school system an unwillingly symbiotic partner in the denial of equal educational opportunity to black students, in the discrimination and pervasive influence resulting from the presence of the three Petitioners in the Calhoun County school system and in the thwarting of the implementation of the desegregation order of the District Court.

For the above and foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, ET AL., *Petitioners*

v.

ROGER W. HUDSON, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.2d 744. The denial of rehearing en banc appears at 515 F.2d 762. The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 21, 1975. A timely petition for rehearing en banc was denied on July 3, 1975 and the petition for certiorari was filed October 3,

1975 and was granted on March 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

United States Constitution—First Amendment: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution—14th Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Policy: Calhoun County Board of Education: [P]rior to the employment of a new teacher or the re-employment of an existing teacher, if the children of any such teacher, if living in Calhoun County, Mississippi, [do] not attend the public schools of said Calhoun County, or if the children of any such teacher, if living outside of Calhoun County, [do] not attend public schools, said teacher would not be employed or re-employed.

QUESTION PRESENTED

Whether, consistent with the First and Fourteenth Amendments, a public school board may terminate the employment of all teachers not sending their children to public schools.

STATEMENT OF THE CASE[1]

Calhoun County, Mississippi, has a county-wide public school system. Within the confines of the system is the Calhoun City Attendance Center, a public school in which petitioners were employed as teachers. Calhoun Academy, a private, segregated facility established in 1968,[2] is also located in the county. This setting gave rise to the instant case involving the constitutional ramifications of a decision to terminate the employment of some public school teachers in the county pursuant to an unwritten policy adopted by the Calhoun County School Board in November of 1972, providing:

> [P]rior to the employment of a new teacher or the re-employment of an existing teacher, if the children of any such teacher, if living in Calhoun County, Mississippi, [do] not attend the public schools of said Calhoun County, or if the children of any such teacher, if living outside of Calhoun County, [do] not attend public schools, said teacher would not be employed or re-employed. [A. 298]

---

[1] With the curtailment of a First Amendment right, a detailed statement is in order. Tinker v. Des Moines Community School Dist., 393 U.S. 503, 509; Pickering v. Board of Educ., 391 U.S. 563; Blackburn v. Alabama, 361 U.S. 199, 205 n.5 ("[W]e cannot escape the responsibility of scrutinizing the record.").

[2] The Academy has received some financial support from the Citizens Council, a group purportedly supporting states' rights and racial integrity. There is little question of this group's purpose. *See* A. 328-35 (solicitation of funds); A. 406-17 (rather outdated articles concerning political and social philosophy). Because of the failure of the Academy to adopt racially nondiscriminatory admission policies, it no longer has tax exempt status under Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.*, Coit v. Green, 404 U.S. 997, or access to free textbooks under this Court's holding in Norwood v. Harrison, 413 U.S. 455.

A. History of the Policy

The Calhoun County School System was desegregated in 1968. *United States* v. *Calhoun County Board of Education,* No. W.C. 6637 (N.D. Miss. 1968). At some point in the following year the then defendant board began discussions of the policy in its present form.[3] Additional impetus for its passage was initiated in February of 1972 when John Burt, the newly-elected (A. 140) superintendent of the Calhoun County School, again recommended it. (A. 151) Working from the basic premise that a "private school [was not needed] in Calhoun County," (A. 161) Mr. Burt testified that at the time he had two objectives in mind: compliance with the court desegregation order[4] and securing the "needed total cooperation and dedication from all people concerned with the public schools." (A. 141) Specifically:

> I personally feel [that sending a child to private school] does affect the teacher in carrying on the performance that should be expected—that we are expecting of *all* teachers and the efficiencies in their job. [A. 141 (Emphasis added.)]

Roger Hudson, principal of the Attendance Center, assumed his position on July 1, 1972, (A. 33) and, aware of the fact that the school board was "knocking around" Burt's proposal, (A. 31) proceeded to tell his teachers, including petitioners, that the policy was

[3] R. W. Mallory, president of the board, testified that prior to its passage in 1972 such a policy had been "discussed" and "in the school board's mind" for 2 or 3 years. (A. 211, 232)

[4] United States v. Calhoun County Bd. of Educ., No. W.C. 6637 (N.D. Miss. 1968). (A 382) The order does not contain any mandate limiting the right of white teachers to send their children elsewhere for an education.

applicable to them irrespective of board action. (A. 31-32) The effect of this action was that all teachers would be maintained in their present status throughout the 1972-1973 school year; pursuant to Hudson's authority under state law,[5] those violating the policy would not be rehired after that period. The basis for this independent decision was an assumption that "a teacher who teaches in a public school system ought to be required to send their children to the public schools . . . ." (A. 36) Tracking the reasoning previously utilized by John Burt, Hudson's testimony set forth two independent objectives: (1) promoting a unitary school system; and (2) precluding "divided loyalties" and therefore promoting efficiency and productivity. (A. 27)

Hudson's interpretation of the now-implemented policy stressed the second foundation for its passage and tracked its literal language (as subsequently passed). He testified it applied to both black and white teachers (A. 18) and that there were to be no exceptions, that is, it was "absolute and inviolate." (A. 25) Specifically, *any* teacher sending his or her child to *any* private school, including those of a religious denomination, (A. 25-26, 39) would be terminated. Hudson's testimony pinpointed striking examples of his approach in "faithfully carry[ing] out the policy" as he perceived it. (A. 18)

[5] "On or before April 1st of each year, the principal of each school shall recommend to the superintendent . . . the teachers to be employed . . . ." Miss. Code Ann. § 37-9-17 (1972). Hudson testified that the understanding of this provision was that his recommendations would be accepted unless "good cause" existed to the contrary. (A. 17) Apparently, there was authority, absent board action, for Hudson to implement such a policy on his own. *See* A. 231.

Mr. and Mrs. Enochs were black teachers employed by Mr. Hudson who placed their child in a school located in Atlanta, Georgia. (A. 19) Only after Hudson sent for and reviewed the records of that school in order to make the determination that it was a "public" institution was the continued employment of the Enochs approved. (A. 20)

Mr. Hamblin, also a teacher at the Calhoun City Attendance Center, has children with hearing problems. As a result of this defect, he sent them to the Magnolia School for the Deaf in Jackson. (A. 24) Hudson testified that Hamblin's reemployment was based on the fact that the facility was "public." (A. 23-24) This issue, however, was not finally resolved until the matter reached the Superintendent, John Burt. Burt testified that Hamblin's hiring was approved only after he determined that although it employed a tuition requirement, Magnolia had access to state and federal funds. (A. 155-59)[6]

This literal application of the policy was *stipulated* as correct by opposing counsel:

> We have agreed to the policy stated. It's simply that the children of a teacher that lives in Calhoun County and teaches in the public school system, *if they do not send their children to the public schools,* they will not be recommended for re-employment. [A. 32 (Emphasis added.)]

---

[6] It should be noted, although the record is not clear on the point, that the situation of the Enochs and Mr. Hamblin apparently reflect implementation of the second portion of the policy, *i.e.*, a teacher living *outside* Calhoun County was under mandate to send his or her child to the "public schools," while teachers living within the county were under mandate to send their children to the public schools *in the county*.

While Hudson was implementing the policy independently of the school board, Paul Moore, the attorney for the board, wrote the Department of Justice concerning the advisability of board action on the matter. His reason for requesting advice was:

> The situation is that we have learned since entering into contracts with certain of the teachers in the School District, *that they have children that they are sending to private schools.* [A. 392 (Emphasis added.)]

Indicating a threatened suit by a "verbal" lawyer-husband of one of the teachers located elsewhere in the county, (A. 392) Moore continued by stating that *he had* "advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their action was correct." (A. 392) Continuing, he described the attitude of the school authorities:

> *The board* also feels that our faculty members should be dedicated to the public school program, and also that their sending children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children. [A. 392 (Emphasis added.)]

Responding, the Department of Justice alluded not to the "dedication" aspect of the policy, nor the fact that the letter indicated an additional objective of denying teachers the right to send their children to *any* private school, but referred instead to this Court's pronouncements on the necessity of taking "positive and affirmative steps" in promoting a unitary system. In this context, the measure was approved as a tech-

nique to eliminate discrimination "root and branch." (A. 403) There was, however, a qualification: "The comments made above do not purport to answer any 'due process' or 'First Amendment' issues which may be raised in this matter." (A. 403) In November of 1972, the policy was adopted by the board. (A. 18, 31, 151)

The board president, R. W. Mallory, (A. 187) testified as to what he considered the scope and motivating factors behind this decision. Stating that it was to be a "blanket policy," (A. 188) he testified that if a "teacher had a kid in [any] private school they wouldn't be re-hired." (A. 189) Mallory did, however, indicate concern with the presence of Calhoun Academy in the county because "[t]hat's where these kids were going."[7] (A. 190)

Pursuant to a motion by respondents for further testimony on the segregated status of Calhoun Academy, District Judge Keady reopened the case. (A. 302, 306-07) Admitted into evidence was additional testimony on the "background" of the board's policy. (A. 199) Mallory, taking the stand once again, noted at the time the policy was adopted there were eight teachers involved.[8] He again stressed the need for dedication:

> Well, this is like we already brought out, that we didn't say in this Calhoun County, [*sic*] maybe

[7] This obviously conflicts with the letter by the board's attorney to the Department of Justice stating that teachers were sending their children to various private schools. (A. 392)

[8] This reference, of course, is to the entire system. The Attendance Center employed 65 to 70 teachers (A. 23) of which two had decided to send their children to private school. (A. 36)

> that's because that's where they work, would be dedicated to the public school system. [A. 199-200]

Referring to the "hard prejudice" demonstrated by those attending the private school when it initially opened, he stated:

> Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought. That's our thinking on it. [A. 201]

Reference was then made to some vague complaints (A. 201) concerning unnamed teachers in the system who had their children in private school. (A. 217) These were characterized by Mr. Mallory in the following fashion: "[Y]ou would hear a parent say the kid wanted to know why so-and-so was her teacher and her kid was in a private school, you know." (A. 217) Although he admitted knowing "everybody" in his district, (A. 227-28) the only persons he identified as making a complaint of this type were the parents of the "Simpson kids," (A. 228-29) *i.e.*, the parents told him what their children allegedly said.

Additional comments were elicited from Mr. Mallory by attorneys for the board relating to that portion of his previous testimony indicating board concern with Calhoun Academy. This time he stressed the impact of its presence, (A. 218) as graphically demonstrated by the introduction into evidence of a significant number of local newspaper accounts detailing Citizens Council activities related to fund raising for the Academy. (A. 219-22)

At this point in the proceeding the intent of the policy was described as "limited" to Calhoun Acad-

emy.' Immediately thereafter, the following dialogue between respondents' counsel and the witness took place:

> Q *And with reference to a child that was deaf or dumb attended,* say, a school of—
>
> A *Well, that would be totally different.* I mean, as far as we were concerned. *Because the biggest concern we had was,* of course, like we said, that these—*if the teacher has got a kid in one school they are bound to have, you know, some loyalty to that school . . . [I]t was our opinion that they wouldn't be as fully dedicated to the school system. That was our basis for forming the policy.* [A. 215 (Emphasis added.)]

On cross-examination:

> Q All right. Then why . . . do you adopt a policy that says, "If you want to teach in this public school you have got to send your children there rather than to a private school"?
>
> A You—if a teacher is going to teach in our school, *if they are going to have their full interest in teaching, their kids are going to be there, too.* That's our opinion. *That's what we based this on.* [A. 226 (Emphasis added.)]

And again:

> Q Then why do you put a restriction on these teachers earning a livelihood and say, "If you don't send your children to public schools then you can't teach there"?
>
> A Because it's our opinion that they are not going to be as dedicated as a teacher should be. [A. 230 (Emphasis added.) *See also* A. 225]

Subsequently, Mallory again referred to his understanding that the policy, as passed, was to be a "blanket policy," extending beyond the Calhoun Academy situation. (A. 232) Laying aside the policy's previous history, Mallory concluded by pointing to the "need" for board passage in the context of "backing [Roger Hudson] up in his decision." (A. 232)

After passage of the policy[10] and subsequent to a determination that petitioners intended to abide by their decision to continue the education of their children at the Academy, they were not reemployed for the 1973-1974 academic year. This decision resulted in the initiation of the instant litigation in the Northern District of Mississippi. It was at this point that the school board, in support of its policy, began to develop an after-the-fact record. As finalized, it encompassed two areas: (1) "expert" testimony from educational psychologists favoring the policy; and (2) circumstantial evidence bearing on the motives of petitioners in sending their children to the private academy.

B. Expert Testimony

Two educational psychologists from the University of Mississippi testified in support of the board's policy. At this point in the proceedings the scope and intent of

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[9] Pursuant to questions by counsel for respondent concerning what facility he had "in mind," Mallory responded: "Well, this was Calhoun—of course, Calhoun Academy was the only facility in the county other than public school." (A. 214) District Judge Keady followed up on this response by inquiring about the "intent." The response: "Well, that was the intent, because that was the only school involved, you know." (A. 214-15)

[10] The record is clear that once the oral policy was passed all teachers "got the word . . . within the next day or two." (A. 213)

the policy as understood by all parties was *again* cemented when counsel for respondent objected to its phrasing by petitioners' attorney on the ground that "he didn't state the policy correctly." (A. 134) This, in turn, led to a rephrasing and the agreed interpretation, as posed to one of respondents' experts:

> Q Doctor, is a policy requiring a teacher who teaches in the Calhoun County System to send their children to a public school or otherwise not be hired or employed, is that a sound educational policy? [A. 135-36]

Focusing on the need for "dedication" on the part of all public school teachers and its favorable impact on teacher performance, the broad applicability of the policy to *all teachers* and *any private school* was assumed at the initial stage of direct examination.[11] The question was posed to Dr. Eicke, the first expert, as to why the policy—pursuant to its literal wording—was "reasonably and significantly related to job performance." (A. 99) He responded:

[11] During the entire span of Dr. Eicke's testimony there were only three minor instances where specific reference was made to the appropriateness of the policy in the context of a unitary school system. At one point he concluded a generalized commentary on reinforcement with the statement: "I think this would be particularly true with the black students." (A. 100) At another point, District Judge Keady requested an expert to "modify" his response to the sending of a child to "a private school that is all white." (A. 104) Dr. Eicke responded that students in Mississippi were "well aware of individuals within the community who support the kind of academies that have come about in recent years." (A. 104) Finally, he noted the policy's "reasonableness" in the context of "integration academies." (A. 105) Dr. Harlan, the second witness, referred on cross-examination to the need for support of a court-ordered unitary school system and his understanding that the policy was "related to . . . carrying out that particular court order and to establish a single unitary school system." (A. 130)

> [A] teacher sending children to a [any] private school would be evidencing a rejection of the public school system and this would set up certain kinds of variables operating.
>
> . . . I think the students would perceive this rejection and as a result would react to the teacher in a different kind of way than if they perceived the teacher as *totally* committed to the educational system. [A. 100 (Emphasis added.)]

Dr. Eicke then proceeded to testify with reference to perceived adverse consequences to *all students:*

> Q Doctor Eicke, would a [any] student perceive a teacher who sent their own children to a [any] private school—a public school student, would this be perceived as a negative social reinforcement?
>
> A I think it would. [A. 101]

After explaining the ramifications of "negative social reinforcement:"[12]

> Q Doctor, . . . what, if anything, would be the effect of a low teacher expectation on a student?
>
> A It's pretty clear that it's lower achievement on the part of students. [A. 103]

On cross-examination the expert's thoughts on the issue crystalized. After being given the opportunity to detail adverse consequences flowing from education in a private, parochial school based on his personal experience of being educated in a Catholic school, (A. 105-07) Dr. Eicke was asked:

[12] [A]n operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance, has the *potential* for increasing or having a positive effect on learning. [A. 101 (Emphasis added.)]

Q Let's talk about your psychology. Do you think that it is wrong for a person to go to a parochial or to a church-related school?

. . . .

A Not any person. I think if a teacher were teaching the public schools [*sic*] that that involves another kind of commitment.

Q All right.

Let's assume that teachers in the State of Mississippi and in the universities, high schools and grammar schools teach in the public schools. *Do you tell this Court that in your position that they should send their children to a public school?*

A Yes. [A. 108 (Emphasis added.)]

. . . .

Q . . . [W]hat's wrong with parents sending their children to those [church-related] schools?

A Inherently, nothing. *Except for the fact that it raises certain conflict of interest ideas.*

Q All right.

Now let's talk a little bit about conflicts of interest. In other words, if I understand your testimony, if a teacher is securing money from a state-supported school, that teacher owes the state the obligation of sending his or her children to the public schools. Is that your—

A Yeah, if they are committed to public education, I think you should.

Q All right. So, then, every teacher who is being paid by the State of Mississippi owes an obligation to send his or her child to a public school. Is that what you are telling us?

A That would be my personal opinion, yes.

. . . .

Q All right. *Let's go to the national level.* Do you think that every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her child to a public school?

. . . .

A My thinking on that is that as long as the public schools can meet the needs of the kids that are involved—

Q That they should do that?

A Yes.

. . . .

. . . I think a person who teaches in the public schools should be committed to the public schools. [A. 109-10 (Emphasis added.)]

On direct examination the second expert witness, Dr. Harlan, proceeded in the same vein. He found the policy "reasonable" inasmuch as it was related to "job performance." (A. 118) Utilizing studies he had made in another part of the state on "poor achievers" and "slow learners," (A. 121-22) as well as an article in *Psychology Today*[13] reviewing a number of studies exploring the effects of lowered teacher expectations on student achievement, counsel for respondent explored with Dr. Harlan the broad ramifications of the policy:

> Q Doctor Harlan, what, if anything, would a [any] student who is in a public school and whose teacher sends their own child to [any] private school, what would that student perceive, if anything, that would affect his learning?

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[13] Rosenthal, *The Pygmalion Effect Lives*, PSYCHOLOGY TODAY, Sept. 1973, at 56. (A. 376-81)

A Well, in my opinion, that would set up a system where other students would perceive or could perceive the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend. [A. 123]

. . . .

Well, if the student is perceiving the teacher as negative and that it is not a viable place for your children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, *probably* would not achieve as well. [A. 124 (Emphasis added.)]

. . . .

. . . [I]f the entire teaching staff is committed to furthering the public education in that county, then the students have a better chance of being successful, achieving. [A. 125]

. . . .

Q Doctor Harlan, do you have an opinion as to what the expectation of a teacher would be who would send their child to a [any] private school while teaching in a public school with respect to the expectation of children in the public school?

A *I wouldn't have an opinion for any particular teacher. I would have to talk to the specific teacher on that.* But the general idea would be—my opinion would be that if you felt that public school was not good enough for your child, you would just have a negative feeling about the public school. You wouldn't think it was good enough for your child and, therefore, you have to send him to a private school. Seems like it would be putting the public school down. [A. 127 (Emphasis added.)]

On cross examination an admission that he knew nothing concerning petitioners' situation was elicited. (A. 128-30) Continuing:

Q . . . .

Then, Doctor, I would presume . . . that your opinion would be the same if I asked if a teacher were employed at the University of Mississippi, Mississippi State, Mississippi Southern, or any state-owned school, that that teacher teaching in a public school owes the state and the school system the duty and obligation of sending their child to a public school.

A Yes—

Q You are hesitating.

A Yes, that would be my opinion, that you should support public education if you are a public school employee. [A. 130]

Finally, the following interchange occurred:

Q Do you believe that a teacher employed in Calhoun County should be deprived of the right to send his or her child to a parochial school?

A If the policy stated in that county is as it is stated, then I think you should make a decision about whether or not you want to work there or not. [A. 133-34]

. . . .

Q Doctor, *is a policy requiring a teacher who teaches in the Calhoun County System to send their children to a public school* or otherwise not to be hired or employed, is that a sound educational policy?

A I think at this point in time it is, I would. [A. 134-35 (Emphasis added.)]

The testimony of petitioners, the only teachers determined to challenge the policy, completes the material portion of the record.

C. Petitioners

In proceedings before the District Court, it was stipulated:

> [T]hat the *only issue* before [the] court is whether or not the policy that [the school board] adopted was reasonable, or Constitutional, or violated the Constitutional rights of the plaintiffs . . . . [A. 7 (Emphasis added.)]

It was agreed that petitioners were competent (A. 226-27) and compatible with the school administration. There had been no complaints from students, parents, fellow faculty members, or the administration questioning petitioners' commitment or teaching ability. This status was maintained at all times prior to the adoption of the policy and in the remaining period of employment (November, 1972-June, 1973). As agreed, "the only reason that they were not employed was because their children attended private school." (not Calhoun Academy) (A. 6-7, 17, 137)

Thus, the case was stipulated for a determination of the constitutionality of the policy and the competence of petitioners was admitted. Considerable trial time, however, was spent in an extensive after-the-fact inquiry into petitioners' motivations, *i.e.*, the accumulation of circumstantial evidence which, presumably, could lead to a determination of whether petitioners' actions could be characterized either as "racist" or as a demonstrable lack of "dedication." The results of the inquiry are as follows:

(1) Billy Cook has 8 years of teaching experience and served as a teacher-coach at the Attendance Center. (A. 12, 61) He has a 7 year-old son, described as an "emotional, nervous, type," attending Calhoun Academy. As explained, he and his wife thought "an environment where there were smaller classes" would present a better learning atmosphere. (A. 62) Mr. Cook also indicated that he did not believe that the child should be placed in the same school in which he was teaching due to the potentiality for showing "partiality." (A. 63) On cross-examination, however, it became clear that, although there were no specialists at the private school, a speech therapist and a guidance counselor were available at the Attendance Center. (A. 78-79) In addition, it was elicited that Mr. Cook's new employment was as headmaster of the private academy and that his son remained in the same school. (A. 72, 76) Mr. Cook's explanation for the latter fact related to apparent problems with his son:

> [M]y child would be in jeopardy because I went to the private school. I don't mind telling you that.
>
> . . . .
>
> . . . I think if it was a different principle this whole question wouldn't have come up, wouldn't be a lawsuit. [A. 82]

Finally, when cross-examined concerning plans for placement of his 5 year-old daughter in school, he responded that, although he had made no plans, (A. 81) "I think that any parent has the right to send their child where they wish as long as it's paid for . . . ." (A. 80)

(2) Mrs. W. P. Wright has 8 years of teaching experience. (A. 84) She lives 5 miles from the public school (A. 84, 86) and within "walking distance" of the Academy. (A. 85) She has two children at the Academy and her stated reasons for sending her children to the private school were: smaller classes, more

individual attention, and a religious program.[14] (A. 85-86) Mrs. Wright further indicated that the children could not ride with her to the public school because of teachers' meetings and the like which occurred after the normal school day. (A. 86)

On cross-examination it was shown that Mrs. Wright was a "patron" of the private school and engaged in various activities, such as raising money, for the institution after fulfillment of her duties at the public school. (A. 90-91) Although she testified that she believes in the public school system and would, indeed, send her children back if they were taught religion, (A. 88) the witness did indicate that she was not "totally committed to a desegregation [*sic*] school system." (A. 95) Mrs. Wright is currently unemployed. (A. 13, 90)

(3) Mrs. Loula Adams has 4½ years teaching experience. (A. 14) She has a 6 year-old son with an enunciation defect who was enrolled at the Academy pursuant to the advice of a speech pathologist at the University of Tennessee. (A. 41, 44, 242) The basis for the decision was a calmer environment, individual attention, and religious training .(A. 41-42, 49) On cross-examination, it was again admitted that the Academy, unlike the Attendance Center, had no speech therapist. (A. 47-50) Mrs. Adams explained, however, that the calmer environment counterbalanced the absence of the therapist. (A. 49) Mrs. Adams is currently employed as a part-time secretary at a salary of $74 per week. (A. 14, 53)

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[14] The academy has a small program of morning devotionals and story hours involving biblical accounts. (A. 56)

SUMMARY OF ARGUMENT

The policy adopted by the Calhoun County School Board, as written and applied, is a prophylactic measure denying all teachers in the county their fundamental right, *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S. June 25, 1976), to send their children to any *private* school—segregated or not. It is therefore subject to being struck as overbroad.

Pickering v. *Board of Education,* 391 U.S. 563, and its progeny teach that prior to the curtailment of a First Amendment right, there must be a record demonstrating *facts* which give rise to a reasonable conclusion that the imposition of a prior restraint is necessary to protect the public school function from serious impairment. With respect to the instant record, however, there is no evidence that: (1) the practice of teachers generally in sending their children to private schools had any effect on the Calhoun County public school system—as contrasted with school authorities; or (2) the decision of petitioners specifically to send their children to Calhoun Academy had any effect whatsoever on their teaching ability. In this context the policy is an unconstitutional infringement on petitioners' First Amendment exercise.

Finally, this past term in *Elrod* v. *Burns,* 44 U.S. L.W. 5091 (U.S. June 28, 1976), this Court reaffirmed a long line of cases consistently disapproving governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization. Direct associational activities by teachers spanning the distance from the Communist Party to the KKK and the NAACP are now presumptively free from state abridgement through termination of

employment. This being so, no constitutional justification exists for blanket terminations of teachers on the singular basis that they choose to exercise their fundamental associational right to send their children to a private, segregated school.

ARGUMENT

I

The Right in Issue

In *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S. June 25, 1976), this Court reviewed its decisions relating to freedom of association, *e.g., NAACP* v. *Alabama,* 357 U.S. 449, parental rights, *e.g., Pierce* v. *Society of Sisters,* 268 U.S. 510, and the right of privacy, *e.g., Roe* v. *Wade,* 410 U.S. 113, and reaffirmed, in no uncertain terms, a parent's basic, fundamental right to send his or her child to any school of his own choosing without interference from the state. With an analysis directly applicable to the instant case, the opinion makes clear that the fundamentalness of the right is not diminished by the form the exercise takes.

> [P]arents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and . . . the children have an equal right to attend such institutions. [44 U.S.L.W. at 5039] [15]

Petitioners do not claim an absolute right to continued employment in the Calhoun County public

[15] This right is subject to the acknowledged "power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils. . . ." 44 U.S.L.W. at 5040. The Calhoun County School Board does not, of course, have any power over the private academy nor may it "preempt the educational process by requiring children to attend public schools." *Id.* at 5039.

schools. On the basis of clear precedent, however, they do contend that they may not be deprived of their positions for constitutionally impermissible reasons. Specifically, petitioners, and all other teachers in Calhoun County, enjoy the fundamental right reaffirmed in *Runyon* which exists independently of their contractual or tenure status or of some notion of their "subjective expectance" for reemployment. The circumstances justifying curtailment of this right lie at the heart of this case.

II

The Policy, as Written and Applied, Is Overbroad

District Judge Keady limited the policy to teachers sending their children to the private, segregated academy, expressing "no opinion as to whether the policy might validly extend to teachers sending their children to schools which do not foster racial discrimination . . . ." 365 F. Supp. at 859. The *per curiam* factual opinion of the Fifth Circuit perceived a "pragmatic virtue [in] facing up to the real issue," 511 F.2d at 746, and agreed with the limited construction. This approach to the facts, however, reflects an acceptance of the enticing invitation this case offers as an appropriate vehicle for a constitutional decision stemming from a presumed unique, compelling fact situation.

This Court obviously has the opportunity to accept a limiting construction if it believes that the record fairly supports the conclusion that a school board in a rural county in Mississippi has—after due deliberation [16]—instituted this policy because of a sincere, seri-

[16] In light of the fact that consideration of the policy began in a time frame close to issuance of the desegregation order of 1968, it must also be assumed that the board perceived District Judge

ous, overriding belief that it had not taken sufficient steps (after court-ordered desegregation) to implement a unitary system. Although possibly possessing certain "pragmatic virtues," this construction of the record creates a factual setting by judicial fiat, totally unrelated to what actually occurred in Calhoun County. Specifically, such an approach wholly fails to accept a carefully devloped record clearly demonstrating that the policy, as written and applied, prohibited *all* public school teachers from sending their children to *any* private school for *any* reason.

Testimony of Roger Hudson, principal of petitioners' school, John Burt, superintendent, and R. W. Mallory, school board president, as well as the school board's attorney (via letter to the Justice Department) clearly substantiate this conclusion. The threatened loss of position of the black teachers with a child attending school in Atlanta and the situation of Mr. Hamblin with children attending the Magnolia School for the Deaf are striking examples of the policy as written and applied. Finally, attorneys for respondent, in addition to stipulating the case on the issue of the constitutionality of the policy as literally worded, produced expert testimony detailing the "reasonableness" of the board's action as applied to all teachers and all private schools. Indeed, no significant portion of their testimony related to presenting empirical validation of the adverse consequences to black students as a result of a white teacher's decision to send his or her children to a private, segregated school —much less Calhoun Academy.

Keady's mandate in that case as not sufficiently broad to bring about a true unitary system.

Paralleling this solid foundation of evidence on the blanket application of the policy is the fact that *all* major witnesses for respondent, including the educational psychologists, stressed the "right" of school authorities to utilize the ultimate coercive sanction of termination (or, if you will, failure to rehire) in order to insure "dedication" to the public school system, as administered by the principal, superintendent and the board.

Judge Coleman's analysis of the facts and the resulting issue is therefore clearly correct:

> [*The policy*] *applied to all teachers who had educable children and some of them complied with it.*
>
> . . . .
>
> The case then boils down to this:
>
> Under the facts of this case, does the United States Constitution deny a public school board the authority to adopt and *uniformly enforce a policy clearly designed, in good faith, to insure the undivided dedication of its teachers (and the appearance of that dedication) to the public school function?* . . .
>
> Actually, those of the general public, who pay the taxes, who keep the public school doors open, and who depend on those schools to educate their children, have a right to expect *undivided teacher dedication, free of any real or apparent conflicts of interest.* [511 F.2d at 749 (Emphasis added.)]

This analysis focuses on the realities facing public school teachers in Calhoun County. As postulated, the parallels between petitioners and the children coerced to salute the flag in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, are clear both in fact and in law.

> If [,however,] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. [*Id.* at 642]

Any fair reading of the record reveals that the mere presence of a private school in the county, coupled with a small minority of teachers sending their children there and elsewhere, was sufficient to generate a direct, vindictive [17] and authoritarian response on the part of the school officials, terminating a fundamental right of teachers once and for all. The most obvious conclusion: a decision reflecting the proprietary instinct [18] of all officials within the system. Stemming either from fear of a perceived growing competition for students by private schools or from their own [19] subjective im-

[17] In addition to the previously noted comments by school authorities about "not needing" a private school in the county, Mr. Mallory, the board president, was asked on cross-examination whether the "private school has ever done anything to your public schools to hurt them in any way?" (A. 238) His response is indicative of an emotional, defensive climate:

> Well, public opinion, you know, some people have a lot of influence, some people influence other people in their thinking. *And just talking something over the counter can have a whole lot of effect on the way the general public looks at schools.*

(A. 238) (Emphasis added.)

[18] This was apparently highly sensitized as demonstrated by the extensive concern expressed by the board president over newspaper accounts detailing fund raising activities on behalf of Calhoun Academy. (A. 218-22, 329-35)

[19] It cannot be assumed that this school board's action mirrored community values and interests as their power has been historically exercised. What has happened in Calhoun County, however, fits the role-model of the American public school teacher. History documents the fact that American teachers in our society have been

pressions as to what individual teachers were signaling [20] when they did not send their children to the public schools, all persons vested with power over the careers of teachers joined in an unequivocal mandate: Subject to the penalty of termination, no teacher will, through the act of sending his or her child to any private school, demonstrate to us *any dissatisfaction* with the way we have chosen the public school system to operate (curriculum, teacher selection, etc.)[21]

As is more fully demonstrated in the following sections, it is obvious that implementation of this blanket prohibition extends the board's power far beyond that which can be characterized as legitimate. *Pickering* v. *Board of Education,* 391 U.S. 563 (dismissal on the sole basis of a First Amendment exercise characterized as "disloyal" is impermissible); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (states may not preempt the educational process by requiring children to attend public schools). If a parent-teacher

subjected to almost total dominance in almost every aspect of their lives by school authorities. BEALE, A HISTORY OF TEACHING IN AMERICAN SCHOOLS (1941). For a detailed contemporary commentary reaching similar conclusions see Sullivan, *The Rights & Status of the Teachers as a Citizen,* Dissertation, 1971, on file Miami University Library, Oxford, Ohio.

[20] As stated by the board president:

> But these—the people that—we'll say [among others] the people that are sending their kids to this Calhoun Academy were pretty well of one mind on the thing. You know what I mean. They thought, "We just as well forget the public school system."

(A. 230)

[21] *Cf.* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (failure to rehire teachers joining the American Federation of Teachers held violative of their associational rights).

wishes to send a retarded or otherwise handicapped child to a private, nondiscriminatory institution for special treatment, no useful purpose related to substantial educational goals would be served by requiring the child to be enrolled in the public school system. It is also probable that a parent-teacher might wish to enroll a child in a desegregated private school, military academy, or parochial school for religious training, or, for that matter, merely acquiesce to his or her child's own independent choice to attend these and other types of institutions. Again, it is *impossible* to perceive any legitimate, compelling state interest which would be sufficient to curtail the exercise of this right by teachers employed by the Calhoun County system. In these and analogous cases, no adverse effects which might justify a prohibition on this activity may reasonably be anticipated. Since all these possibilities are foreclosed by the challenged policy, it is obviously overbroad.

In *Young* v. *American Mini Theatres, Inc.*, 44 U.S.L.W. 4999 (U.S. June 24, 1976), this Court reviewed its past receptiveness to challenges of facial overbreadth:

> "Such claims . . . have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." . . . In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes

> which, by their broad sweep, might result in burdening innocent association. [*Id.* at 5002 n.17]

Continuing, the opinion set forth the factors necessary to substantiate an overbreadth attack. First, the deterrent effect must be both "real and substantial," and second, the statute or ordinance in question must not be "readily subject to a narrowing construction by the state courts . . . ." *Id.* at 5002.

The Calhoun County School Board's policy meets both criteria. There can be little doubt that there exists a real, substantial, chilling effect on *all* teachers within the system desiring, for innumerable legitimate reasons, not to utilize the public school system for the education of their children. Moreover, the possibility of a limiting construction is, at best, remote. First, it was applied as written. Second, respondents explicitly joined in a test of facial validity by stipulation. Third, the policy, by its plain terms, is not readily susceptible to a narrowing construction. Fourth, all witnesses on behalf of respondent testified as to its blanket applicability. Identifying similar factors in *Erzoznick* v. *City of Jacksonville*, 422 U.S. 205, this Court concluded:

> In these circumstances, particularly where as here [respondent] . . . *offers several distinct justifications for the ordinance in its broadest terms*, there is no reason to assume that the ordinance can or will be decisively narrowed. [*Id.* at 217 (Emphasis added.)]

On the basis of the foregoing, the policy must be struck as overbroad.

III

Under This Court's Decision in *Pickering*, Petitioners' Loss of Employment Is Unconstitutional

Current methodology reconciling individual and state interests is reflected in the analysis adopted by this Court in *Pickering* v. *Board of Education,* 391 U.S. 563.[22] An Illinois teacher was dismissed for writing a letter to a local newspaper critical of his school board. The board defended the dismissal by asserting, as respondents do here, that teachers within the system have a "duty of loyalty," *id.* at 568, and that the letter—as is allegedly the activity in the instant case—was "detrimental to the efficient operation of the schools in the district . . . ." *Id.* at 564. This Court reversed the lower court's holding (which was similar to the conclusion reached by two judges in the instant case) that Pickering's acceptance of a teaching position in the public schools obliged him to refrain from engaging in First Amendment activity related to the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." *Id.* at 567. In so doing, this Court recognized that while the interests in public employment have been dichotomized into those of the individual and those of the government, neither interest would rule out the

[22] Individual interests subject to the *Pickering* analysis must involve exercises of fundamental rights as contrasted with those falling outside explicit protections found within the Constitution. In the latter circumstance, all state regulation will withstand constitutional challenges unless branded "arbitrary." *See* Kelley v. Johnson, 96 S. Ct. 1440 (upholding hair regulations for policemen); *cf.* Wardell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976) (residency requirements for teachers; no fundamental right to commute); *accord,* McCarthy v. Philadelphia Civil Serv. Comm'n, 96 S. Ct. 1154, *citing Wardell* with approval.

other. A proper resolution of their conflict demanded they be balanced against each other.

> "[T]he theory that public employment which may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." . . . At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [*Id.* at 568]

As posited, application of a balancing approach incorporated as a dispositive factor the degree to which professional effectiveness was lowered by the First Amendment activity in question.[23] The Court in *Pickering* found the record devoid of *any* evidence pertaining to the effect of the letter on the

[23] This is to be distinguished from the status of the individual raising the claim. As stated by Mr. Justice Marshall, "the status of the individual raising the claim bears [not on the existence of the right but rather] on the question of whether the right is outweighed by a legitimate state interest." Kelley v. Johnson, 96 S. Ct. 1440, 1449 n.5 (Marshall, J., dissenting). Were it any other way that "would mean that more than 11 million American citizens are currently affected by having 'executed' . . . 'automatic waivers.' " *Id.*

In *Pickering* this Court held that if a teacher's exercise of his constitutional freedoms destroyed his harmonious relations with co workers, impaired the ability of his superiors to maintain proper discipline, impeded the administration of the school by publicly airing private disputes rather than public issues, or impaired his own ability to remain an effective teacher, then the school board could have a permissible basis for terminating his employment. 391 U.S. at 569-73.

community as a whole or the school system in particular. Indeed, if anything, it demonstrated that Pickering's First Amendment exercise "was greeted by everyone but its main target, the Board, with massive apathy and total disbelief." *Id.* at 570. Since the exercise had *no* adverse impact on legitimate state interests, the dismissal was not constitutionally sustainable.

Later cases make clear that once an infringement of a First Amendment exercise occurs within the school environment, authorities curtailing the exercise must justify their action by showing "material and substantial" interference with a legitimate school function. *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, held unconstitutional a limitation on student First Amendment behavior protesting the Vietnam War. Prefacing the analysis with the statement that "[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate," *id.* at 506, the opinion concluded in the style of *Pickering:*

> As we have discussed, the record does not demonstrate any *facts* which might reasonably have led school authorities *to forecast substantial disruption of or material interference with school activities,* and no disturbances or disorders on the school premises in fact occurred. [*Id.* at 514 (Emphasis added.)]

In *Healy* v. *James,* 408 U.S. 169 (unconstitutional exclusion from campus of SDS Chapter), this Court again rejected curtailment of First Amendment activities on the basis of "undifferentiated fear" (abhorrence to the philosophies of a group), and concluded that in all First Amendment cases taking

the form of prior restraint, a "heavy burden" of proof[24] is placed on school administrators to justify infringement. *Id.* at 184. Mr. Justice Powell continued in language pertinent to the facts of the instant case:

> [T]he Court has consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization. . . . [I]t has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights . . . . The Government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims. [*Id.* at 185-86]

Continuing, the Court found that "[t]he mere disagreement of the President [as herein the Calhoun County School authorities] with the group's philosophy affords no reason [without more], to deny . . . [associational freedoms]." *Id.* at 187. Finding no factual support in the record from which it could be concluded that organizational members would disobey "campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education," *id.* at 189, the basic right of associational freedom without school infringement was affirmed.

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[24] The extent of the burden is clearly evinced in a separate line of cases. In Stanley v. Illinois, 405 U.S. 645, this Court admonished against basing determinations on presumptive evidence when important interests are at stake. Similarly, a presumption that a teacher was incapable of continuing her duties beyond the fifth month of pregnancy was declared unconstitutional as violative of Due Process in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632.

Pickering and its progeny control the instant case. The record is devoid of the evidence needed to constitutionally sustain either the individual terminations of employment or, as a secondary matter, the "heavy burden" of proof placed on school authorities to—in a classic form of prior restraint—impose a blanket preclusion of associational freedoms, on all teachers and their children within the system.

(1) *Petitioners:* As stipulated, the sole basis for termination of petitioners' employment was violation of the policy. It was therefore not related to any subjective or objective reasons petitioners possessed either at the time their choice was made or from any resulting "carryover" effect into the school environment. Indeed, after an extensive inquiry into their motivations, District Judge Keady failed to make *any* finding with respect to objective tainted "racist" activity (presumably the only "unlawful" activity at issue) or any adverse consequences to the school environment because of their individual actions.[25] In the

[25] Judge Keady found that "the dominant . . . reason why each [petitioner] enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system." 365 F. Supp. at 858. Obviously, this reasoning applies to all parent-teachers sending their children to any private school. It also fails to take into consideration those reasons totally disassociated from a racial animus for sending one's child to a segregated facility.

The case would stand on a much different constitutional footing if the record affirmatively demonstrated racial attitudes on the part of the petitioners which, for example, through proselytizing, carried over into the classroom with an adverse learning impact. *Cf.* Smith v. St. Tammany Parish School Bd., 448 F.2d 414 (5th Cir. 1971) (injunction against display of Confederate flag in principal's office; resulting disruption through demonstrations); Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970) (utilization of Confederate symbols causing disruption enjoined).

classic *Pickering* mold, petitioners' action was greeted by everyone but the school authorities with not only "massive apathy," but also, on the basis of the record made below, with "massive ignorance."

(2) *All Teachers:* Aside from the specifics of petitioners' case, the record is seriously deficient of evidence, other than the concerns expressed by school authorities, indicating that those circumstances giving rise to the policy were such as to mandate action by the board. Particularly, other than passing reference to "you would hear talk" and hearsay testimony over concerns expressed by the "Simpson kids," no direct, factual and credible evidence demonstrates that passage of the policy was necessary to protect the educational environment of the Calhoun County School System.[26] *Cf. Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 509 (prohibitions on future First Amendment activities must be justified "by something more than a mere desire to avoid dis-

[26] This, of course, distinguishes the instant case from United Public Workers v. Mitchell, 330 U.S. 75, and United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, upholding the Hatch Act. In the latter decision, the Act was sustained not because the government has any plenary power to restrict personal freedoms of its employees, but because the government clearly identified interests served by the Act which the Court, in turn, found overbalanced those of federal employees. 413 U.S. at 564-67. As this Court also subsequently noted in Elrod v. Burns, 44 U.S.L.W. 5091 (U.S. June 28, 1976), "legislative restraints on political management and campaigning were [upheld in *Letter Carriers* and *Mitchell*] . . . because they served to *protect* individual belief and association and, thereby, the political process." *Id.* at 5097 n.20 (Emphasis added.). Put another way, the deliberate judgment of Congress, based on historical evidence, was upheld in order "to safeguard the core interests of individual belief and association." *Id.* at 5098.

comfort and unpleasantness . . .").[27] Thus, in the instant case, as in *Pickering:*

> [T]he only way in which the Board could conclude, *absent any evidence of the actual effect of the letter* [as here, the sending of children to private school] . . . was per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. [391 U.S. at 571 (Emphasis added.)]

Singular justification for the policy must therefore come from the after-the-fact generalized testimony on the part of two educational psychologists. As previously demonstrated, a major portion of their presentation related to the policy's reasonableness in the context of teacher commitment; an insignificant, conclusory segment was directed to its utilitarian value vis-à-vis the unitary school concept.

With respect to the first justification, *Pickering* teaches that lengthy postulations concerning the "rea-

[27] Mr. Justice Fortas, finding no factual support in the record concerning adverse consequences stemming from the prior exercise of the First Amendment activity at issue (wearing armbands), concluded:

> Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

393 U.S. at 509. As in the instant case, there was also support in the record to justify the conclusion that it was not fear of disruption to the education process that motivated the board's action, but, it, rather, "was directed against 'the principle of the demonstration' itself." *Id.* at 509 n.3. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (belief of board that pregnancy regulation should be passed because some children think "teacher may have swallowed a watermelon").

sonableness" of curtailing the fundamental rights of all teachers in the system in order to insure "dedication" and avoid "conflicts of interest" is not a sufficient substantial state interest, in and of itself, to curtail the exercise of a fundamental right.[28] Thus, a teacher may engage in *any* type of First Amendment activity capable of being characterized as "disloyal" or a demonstrated "lack of dedication" *up to the point* it affects his professional competence within the school environment. 391 U.S. at 573 n.5; *accord, Elrod* v. *Burns,* 44 U.S.L.W. 5091 (U.S. June 28, 1976). While the record made by respondents' experts is replete with such terms as "potential," "may," "could," "if," and "probably," most poignant is this portion of Dr. Harlan's testimony when juxtaposed with applicable constitutional standards of material and substantial interference with the teaching function:

> Well, if the student is perceiving the teacher as negative and that it is not a viable place for your own children to go then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, *probably* would not achieve as well.
>
> Q Would this be a positive effect or detrimental effect?
>
> A Well, I would say that it would be detrimental. *I wouldn't use "detrimental," I would*

[28] *See* Pickering v. Board of Educ., 391 U.S. 563, 574 n.6 (noting that the opinion does not attempt to deal with the issue of First Amendment activities which may "reasonably be presumed" to have harmful effects on the school environment); *cf.* Keckeisen v. Independent School Dist., 509 F.2d 1062 (8th Cir. 1975), *cert. denied,* 96 S. Ct. 57 (dismissal for violation of regulation prohibiting marriages between administrators and teachers).

> *probably use something like negative or just a lack of positive reinforcement.* [A. 124 (Emphasis added.)]

This testimony, as did that in *Pickering,* speaks to nothing more than factually unsubstantiated "reasonable conclusions" that the First Amendment exercise in issue *may be* "detrimental to the best interests of the schools." 391 U.S. at 567. Neither it nor anything else in the record produces the quality of evidence needed to meet the constitutional standard.[29]

With respect to the policy as a means of properly implementing a unitary school system the posed justification is feeble. It completely fails to demonstrate a credible link between the act of placing a child in Calhoun Academy and actual adverse educational consequences to the unitary system. To justify a constitutional termination of the employment of all teachers sending their children to a private, segregated academy, the fact that teachers sent their children to such a school must be used to infer an attitude of racial

[29] In the context of a First Amendment exercise, there are no decisions by this Court holding that expert testimony of the quality found in the instant record may be utilized to curtail the constitutional exercise. *Cf.* Paris Adult Theatre I v. Slayton, 413 U.S. 49. As recently noted by the California Supreme Court:

> [T]estimony which qualifies as admissible expert or opinion testimony . . . is, of course, perfectly good evidence. However, *where such testimony is not based upon actual experience,* it has limited utility in justifying a restriction of freedom of expression.

Los Angeles Teachers Union v. Los Angeles Bd. of Educ., 71 Cal. 2d 551, 44 P.2d 827, 835 n.13, 78 Cal. Reptr. 723 (1969) (Emphasis added.). This court now accepts such testimony to show the reasonableness of a regulation, but not as proof that the public gain to be derived from limiting constitutional exercises outweighs resultant impairments of freedom of expression. *Id.*

prejudice, from which classroom discrimination is inferred, from which negative social reinforcement and concomitantly inferior learning are, in turn, inferred.[30]

There is no *justification* for the deprivation of a fundamental right based on such a tenuous linkage of inferences. This Court, through *Pickering, Tinker,* and *Healy,* has mandated that inferences must be drawn from concrete facts, not abstractions; *and the concrete fact in this case* is that other than adverse reactions by school officials the record is *devoid* of evidence concerning a debilitating effect on the black children in the public school system *directly* related to white teachers sending their children to the private academy. The secondary *fact,* of course, is that three capable, individualistic, and experienced teachers—stipulated by respondents to be fully qualified—have been dismissed for one reason and one reason only: violation of a policy clearly infringing on all teachers' fundamental First Amendment rights *with no record* showing through credible, factual evidence that the exercise of this right by teachers in general or the petitioners in particular *in any way* affected the public school

[30] There is no significant correlation between perceived teacher attitudes toward integration and the academic achievement of southern Blacks. UNITED STATES DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY OFFICE OF EDUC., 2 COLEMAN REPORT (1966) (Supplemental index). A more recent study concludes: "There is no evidence that school reform can substantially reduce the extent of cognitive inequality, as measured by . . . test scores or educational attainment." C. JENCKS, INEQUALITY 8 (1972). *Compare* Davidson & Land, *Children's Perception of Their Teachers' Feelings Toward Them Related to Self-Perception, School, Achievement & Behavior,* 29 J. EXPERIMENTAL EDUC. 107, 112 (1960), *with* S. Koslin, B. Koslin & R. Paragament, *Efficacy of School Integration Policies in Reducing Racial Polarization,* Paper presented at the American Psychological Association, Honolulu, Hawaii, Sept. 1972, at 14.

system. On the basis of *Pickering* the decision below must be reversed.

IV

The Policy Is a Per Se Violation of First Amendment Rights

Although this Court's decisions relating to overbreadth and *Pickering* are sufficient to justify a reversal in the instant case, there exists a separate, distinct line of cases bearing upon the constitutionality of Calhoun County's prophylactic curtailment of First Amendment freedoms within the school system. The criteria these decisions develop are specific, thoroughly considered, and now enjoy the status of an integral part of the day-to-day working relationships between all public employees and the government.

Adler v. *Board of Education,* 342 U.S. 485, played a major role at the trial and appellate stages of this case. After noting that teachers work in a "sensitive" classroom environment, the basic holding of *Adler* was that the "privilege" of working for a school system may be denied on the basis of "tainted" organizational activities—there, membership in a subversive organization. Although Judges Keady and Coleman found the decision persuasive in the context of bearing on the "reasonableness" of the Calhoun County policy, *Adler* is a constitutional derelict.

In *Keyishian* v. *Board of Regents,* 385 U.S. 589, this Court held the Feinberg Law (also at issue in *Adler*) unconstitutional on the basis of vagueness and overbreadth. Mr. Justice Brennan, after stating the flat constitutional prohibition against stifling fundamental personal liberties "even though the governmental purpose be legitimate and substantial," *id.* at 602, turned his attention to the *Adler* philosophy:

> [T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable has been uniformly rejected . . .. It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [*Id.* at 605-06]

The demise of *Adler* was thus complete.[21] More recently, in *Perry* v. *Sindermann,* 408 U.S. 593, a teacher alleged that his 1-year contract was not renewed because of a First Amendment exercise. Responding to the argument that a lack of contractual or tenure rights defeated a claim of constitutional significance, the Court, per Mr. Justice Stewart, stated that the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. *For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be penalized and inhibited. This would allow the government to "produce a result [it] could not command directly."* [*Id.* at 597 (Emphasis added.)]

---

[21] *See also* Pickering v. Board of Educ., 391 U.S. 563, 568:

> To the extent that [the lower court opinion] may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

This past Term, in *Elrod* v. *Burns*, 44 U.S.L.W. 5091 (U.S. June 28, 1976), associational activities by public employees and the circumstances under which the state might curtail this right were definitively analyzed in the context of this Court holding unconstitutional the practice of political patronage dismissals of nonpolicy-making state employees. Mr. Justice Brennan, speaking for the Court, initially focused on the constitutional fact that political beliefs and associations "constitute the core of those activities protected by the First Amendment . . . ." *Id.* at 5094. Citing *Keyishian* and *Sindermann*, the Court stated:

> Patronage practice falls squarely within the prohibitions [of these cases] . . . . *Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party.* The threat of . . . dismissal for failure to provide support only penalizes its exercise. The belief and association which Government may not ordain directly are achieved by indirection. [*Id.* at 5095 (Emphasis added.)]

Answering the ever present "right-privilege" argument,[22] Mr. Justice Brennan stated:

> That is the notion that because there is no right to a Government benefit, such as public employment, the benefit may be denied for any reason. *Perry*, however, emphasized that "[f]or at least a quarter-century this Court has made clear that even though a person has no 'right' to a valuable

[22] Reference to *Adler* was only made in the context of its place in a line of cases inferring "ill conduct grounded merely on political associations." The fact *was again* noted that, since that decision, *Adler's* basic philosophy has been "consistently rejected." 44 U.S.L.W. at 5097 n.19, *citing Keyishian*.

> governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." . . . *Perry* and *Keyishian* properly recognize one such impermissible reason: the denial of a public benefit may not be used by the Government for the purpose of creating an incentive enabling it to achieve what it may not command directly. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." . . . "[T]his court has now rejected the concept that constitutional rights turn upon whether the governmental benefit is characterized as a "right" or as a "privilege." '" [*Id.* at 5095]

With respect to the degree of scrutiny employed by this Court when associational activities are impaired by governmental action, Mr. Justice Brennan detailed existing principles relating to the constitutionally mandated *exacting* nexus required between a proven high state interest and the right curtailed: (1) "a significant impairment of First Amendment rights must survive exacting scrutiny;" (2) "[t]he interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest;" (3) "it is not enough that the means chosen in furtherance of the interest be rationally related to that end;" (4) "[t]he gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights;" (5) means must be employed which are "closely drawn to avoid unnecessary abridgement;" (6) "[p]recision of regulation must be the touchstone in an area so closely touching most precious freedoms;" and (7)

> In short, if conditioning the retention of public employment on the employee's [loss of associational freedoms] . . . is to survive constitutional challenge *it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end,* and the benefit to be gained must outweigh the loss of constitutionally protected rights. [*Id.* at 5096 (Emphasis added.)]

Turning to the argument that one justification for patronage was "the need to insure effective government and the efficiency of public employees," *id.* at 5096, this Court initially noted the gross inefficiency of wholesale replacements and the questionable conclusion that replacements would be "more qualified." Continuing:

> *More fundamentally, however, the argument does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used . . . for imputing such behavior.* The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct. [citing *Keyishian*] . . . At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. *Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.* [*Id.* at 5096-97 (Emphasis added.)]

Similar postulated interests of the state met identical rejections, *i.e.*, the "need for political loyalty" was rejected by limiting dismissals to policymaking positions, an obviously "less drastic" alternative and "preservation of the democratic process" was found inadequate since associational freedoms are essential to a meaningful democratic system. *Id.* at 5097-98.

The Court's analysis in *Elrod* is directly applicable to the instant case. The Calhoun County School Board policy obviously results in a severe curtailment of First Amendment freedoms, *i.e.*, teachers within Calhoun County "hold their jobs on the condition that they provide, in some acceptable manner, support" for the public school system. "The threat of dismissal for failure to provide support only penalizes that exercise." In contrast to the constitutional demand for "precision of regulation" and the prohibition against limiting associational freedoms when the state interest may be only rationally related to the end achieved, the policy as written is blanket in nature. Specifically, it cuts an arbitrary, draconian swathe, curtailing First Amendment exercises on the part of all teachers, no matter how tenuous the state interest is or may be.

If limited to teachers with children in the private segregated academy, it transgresses *Keyishian* and *Elrod* by impermissibly imputing poor or adverse performance characteristics to assumed, unproven beliefs stemming from the exercise of a fundamental associational right. This right, however, is, and will continue to be, exercised for any number of reasons disassociated from the tainted racial overtones assumed by the board, *i.e.*, the teacher in the public school, while completely satisfied with his or her performance, may have serious qualms concerning all or a remainder of the other portions of the curriculum and choose to send a child elsewhere, even at the expense of an integrated education. The "highly imprecise" characteristics

of the policy have been previously analyzed by Judge Clark:

> The fit between the Board's policy and the governmental interest it is alleged to serve is highly imperfect: it excludes from the public schools teachers who do not possess the characteristics that underlie its premises but who are unwilling to abide by its terms, while it permits to remain teachers who possess racial attitudes of much greater disadvantage to their students. Whatever actual benefits may accrue to the school system by operation of the policy will be as much by coincidence as by design. The reason for this is plain. The Board has incorrectly singled out a teacher's decision to send his or her own children to private school as an infallible indicator of an undesirable classroom effect that it has a legitimate interest in removing. Because of this, the policy acts arbitrarily to deny a fundamental right to public school teachers and therefore cannot be upheld. [511 F.2d at 753]

Obviously there exists a "less drastic means" similar to that found in *Elrod*. If the exercise of the associational right does result in poor job performance (as found through annual evaluations and other techniques) discharge may constitutionally be imposed.

It is also doubtful that the gain to the subordinating interest provided by the means will outweigh the incurred loss of protected rights. The facts of this case demonstrate that the Calhoun County School System lost the services of three qualified, competent professionals on the basis of a record which includes *no evidence* that their constitutionally-protected exercise had any adverse effect on their performance in the classroom or within the school system generally. There is,

however, a significant percentage of the population falling outside that portion inhabited by petitioners, *e.g.*, single persons; married persons without children; married persons with children enrolled in the public school system, who, for any number of reasons, are less qualified, albeit employable, and who may also possess racial attitudes inappropriate to the school environment. Absent adequate screening mechanisms capable of exploring the subjective, emotional biases of prospective teachers, it is clear that selection from the replacement population will hardly reflect a significant gain outweighing the incurred loss of associational rights of teachers in Calhoun County.

The foregoing analysis postulates what petitioners contend is the correct constitutional framework for the instant case. What it fails to do, however, is to highlight the evolution of applicable constitutional standards in the context of past broad infringements of associational freedoms by state and local governments when faced with real or perceived threats to existing state interests. The history of the Court's increasing concern with the undue burdening of extramural innocent associational activities by firings, imposition of loyalty oaths and the like, from *Adler* to *Keyishian*, is fresh and well documented. *See, e.g.*, Developments in the Law, *Academic Freedom*, 81 HARV. L. REV. 1045 (1968). One decision in this line, however, bears special mention in light of the contrast in its facts with the instant case.

The case arose from the Eastern District of Arkansas under the caption of *Shelton* v. *McKinley*, 174 F. Supp. 351 (E.D. Ark. 1959). Injunctive and declaratory relief were sought against two acts passed by the Arkansas Legislature. The first (Act 10) provided

that no teacher could be employed within the state until an affidavit was submitted listing all organizational affiliations within the preceeding five years. The second (Act 115) incorporated a lengthy preamble, the gist of which was a legislative finding that the NAACP had been guilty of creating "racial strife and turmoil." *Id.* at 354. (as respondents attempt to so characterize those supporting the Calhoun Academy enclave)[33] This, in turn was followed by Section 1 making it unlawful for any member of the NAACP (now teachers with children in private school) to be employed by any school within the state.[34]

Citing *Adler,* the disclosure requirements of Act 10 were upheld as reasonably related to a determination of professional fitness. With respect to Act 115, however, the court, citing *Wieman* v. *Updegraf,*[35] concluded:

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[33] See A. 404-17, for a compilation of newspaper articles introduced by respondents detailing occurrences at the local Citizens Council meetings.

[34] Section 2 of the Act made a refusal to furnish an affidavit that a person was not a member of the NAACP a ground for dismissal from employment. Section 3 provided a hearing for all persons discharged from public employment on account of NAACP membership. 174 F. Supp. at 354. While the record in the instant case reflects no receptiveness by the Calhoun County Board to have granted petitioners a hearing, (A. 243-45) the analysis found in *Shelton* is directly applicable:

> That section [3] gives one who was dismissed or denied employment on the ground that he was a member of the NAACP, and who claims that he was not a member, an opportunity to obtain a hearing on that issue alone. Once membership is *established, [however,] then discharge or a declaration of ineligibility automatically follows.*

174 F. Supp. at 358 (Emphasis added.).

[35] 344 U.S. 183 (holding that public employees could not be terminated for patently arbitrary and discriminatory reasons).

> [T]he statute is clearly unconstitutional since it makes mere membership in the NAACP a ground for dismissal from or a declaration of ineligibility for public employment, regardless of whether the employee or applicant involved had any knowledge of or sympathy with the aims and purposes of the organization, as declared by the Legislature, or had actively participated in the activities found by the Legislature to be anti-social and undesirable, or whether he was completely innocent of such knowledge, sympathy or participation and *had joined and was desirous of maintaining his membership in the Association out of sympathy with its publicly announced objectives which* are clearly lawful. [*Id.* at 358 (Emphasis added.)]

So clearly correct was this holding that no appeal was taken by the state.[36] Appeal was taken, however, by

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[36] From an historical and constitutional perspective, it should also be noted that the court in *Shelton* placed heavy reliance on Chief Judge John Parker's dissent in Bryan v. Austin, 148 F. Supp. 563 (E.D.S.C. 1957). South Carolina had also enacted a statute prohibiting members of the NAACP from teaching. With now Mr. Justice Marshall bringing the suit, the three-judge panel abstained and this Court vacated and remanded as moot. 354 U.S. 933. Judge Parker's opinion bears quoting in the context of juxtaposing the Calhoun County policy:

> There is no finding in the preamble to the statute, nor is there any contention, that it is the purpose of the National Association for the Advancement of Colored People to overthrow the government by force and violence or to engage in any other form of criminal conduct. The organization [has engaged in many activities] . . . the results of which have been very unpopular in some sections. . . . The fact that organizations may render themselves unpopular with the majority in a community is no reason why the majority may use its power to enact legislation denying to their members the fundamental rights of constitutional liberty.

148 F. Supp. at 569.

A dissent by district Judge Timmerman, disagreeing with Chief Judge Parker, also contains some remarkable language applicable

appellants on the lower court's determination that the full disclosure requirements of Act 10 violated their First Amendment associational rights.

Justice Stewart, for the Court, reaffirmed *Adler* in the limited context of the state's power to make in-

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to arguments made in support of the Calhoun County policy. After complaining that "the Bible has been ruled out of the public schools," and citing *Adler* for the proposition that the findings of fact by the legislature concerning the NAACP clearly have a "rational basis," he noted that "[i]ndeed, if the statute has any bearing on constitutional liberties, it protects [as the policy in issue here protects the unitary school] rather than limits them. The statute is designed to protect young minds from the poisonous effects of NAACP propaganda." *Id.* at 581. Concluding:

> In the light of the other legislative findings, it also means that a state cannot rule out of its schools teachers who [allegedly like the petitioners herein] would sow the seed of discord and unrest, which if unimpeded, would blossom into outright strife. It also means that a state cannot keep out of its schools teachers who falsely represent the existence of a disparity in educational advantages among the races that in fact does not exist, and who would subject school children to teachings that are untrue. . . . The concluding finding in the statute is that the NAACP . . . "is so insiduous in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, [as allegedly is Calhoun Academy vis-à-vis partial support by the Citizens Council] that membership in such an organization is wholly incompatable with the peace, tranquility and progress that all citizens have a right to enjoy."

Id. at 579.

During this time frame, a number of significant pre-*Pickering* and *Tinker* lower-court opinions struck down as unconstitutional the termination of qualified teachers on the basis of civil rights activities in circumstances similar to those presented by petitioners, *i.e.*, without a showing of substantial detriment to classroom performance. *See, e.g.*, Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Rackley v. School Dist. No. 5, 258 F. Supp. 676 (D.S.C. 1966); Williams v. Sumter School Dist. No. 2, 255 F. Supp. 397 (D.S.C. 1966).

quiries into the background of those who seek to teach."[37] *Shelton* v. *Tucker*, 364 U.S. 479, 485. Agreeing that there was a "substantial relevant correlation between the governmental interest asserted and the state's effort to compel disclosure," *id.*, the opinion continues by noting that teachers within the state had no tenure and that each school board had access to the information disclosed. From this the Court reasoned that the injury had an impermissible *in terrorem* effect on outside activities of the teachers since their continued employment depended upon the uninhibited discretion of their supervisors to renew their 1-year contract. *Id.* at 486. Specifically, there existed an implicit mandate "to avoid any ties which might displease those who control . . . professional destiny . . . ." *Id.*

The Court then turned to the obvious dragnet approach to ferreting out all associational activities of teachers which "could have no possible bearing upon the teacher's occupational competence or fitness," in-

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[37] This rather finalized interpretation of *Adler* obviously upholds that portion of the opinion relating to the government's right to make investigative inquiries to determine the competence and fitness of those whom it hires to teach in its schools. Petitioners do not take issue with this or the fact that under "limitations carefully observed" a state may inquire into an individual's affiliations and associations "as a preliminary to further inquiry into the nature of the association" in order to make a judgment about an applicant for admission into a particular profession, including, presumably, that of a public school teacher. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165-66; *cf.* Baird v. Arizona, 401 U.S. 1, 7 ("A state may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."). This, of course, is not the nature of the policy at issue here, *i.e.*, utilization of the mere fact of a teacher's particular choice of education for his children as proof of "guilt by association" and a per se disqualification from public school teaching.

cluding protected NAACP membership. *Id.* at 488. Concluding in language adopted in *Elrod,* the Court stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, *the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.* The breach of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose. [*Id.* at 488 (Emphasis added.)]

The NAACP experience goes to the heart of Judge Charles Clark's expressed constitutional distaste for the curtailment of a basic associational right on a record such as that in the instant case:

> Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. The problem is that the decisional principle it establishes applies to all forms of personal associations from the Ku Klux Klan to Black Panthers, and from membership in the Citizens Counsel to membership in the NAACP. Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone. [511 F.2d at 757]

The "decisional principle" is obviously wrong. Absent evidence relating to adverse teaching consequences, NAACP members can and do teach, just as do members of the KKK, Black Panthers, and the Citizens Council. If these direct, personal associations are presumptively free from state abridgement, it should be

clear that no blanket, constitutional sanction can be given to dismissing teachers sending their children to private, segregated academies. In the words of Judge Charles Clark, the decision below must be reversed or "we are [all] undone." [38]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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[38] Obviously there are also additional sound constitutional reasons for striking the policy. Having infringed a fundamental right, it is clear that the policy cannot withstand scrutiny under an Equal Protection analysis and the "compelling interest" test. Shapiro v. Thompson, 394 U.S. 618 (requiring utilization of the least "drastic means"). Incorporating an "irrebuttable presumption," *i.e.*, all teachers within the class have certain defined characteristics (which is certainly not the case), it is also subject to being struck as violative of Due Process under this Court's decision in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632. The policy is also an attempt to accomplish by indirection that which cannot be done directly. Pierce v. Society of Sisters, 268 U.S. 510, and Runyon v. McCrary, 44 U.S.L.W. 5034 (U.S. June 25, 1976), teach that the state may not preempt the educational process by requiring children to attend public schools.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, ET AL, *Petitioners*

v.

ROGER W. HUDSON, ET AL, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SECONDARY AUTHORITY:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, ET AL, *Petitioners*

v.

ROGER W. HUDSON, ET AL, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855 (Pet. A. 30a).[1] The opinion of the Court of Appeals for the Fifth Circuit is reported at 511 F. 2d 744 (Pet. A. 2a). The denial of rehearing en banc by the Court of Appeals is reported at 515 F. 2d 762 (Pet. A. 1a).

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[1] References to the Appendix contained in the Petition for Certiorari are cited at "Pet. A. ——". References to the General Appendix are cited at "A. ——".

JURISDICTION

The jurisdiction requisites are adequately set forth in the Brief for Petitioners.[2]

CONSTITUTIONAL PROVISIONS AND REGULATION

UNITED STATES CONSTITUTION—FIRST AMENDMENT: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

UNITED STATES CONSTITUTION—14TH AMENDMENT: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

POLICY—CALHOUN COUNTY BOARD OF EDUCATION: (P)rior to the employment of a new teacher or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed.[3]

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[2] Amicus Curiae National Education Association ("NEA"), has suggested that the Writ of Certiorari should be dismissed as having been improvidently granted, relying upon *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976), and *Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955). The "NEA's" position in this regard has some merit. Also see dissenting opinion of Mr. Justice Harlan in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 at 477-80 1968).

[3] Petitioners in the Constitutional Provisions and Policy portion of their Briefs have misstated the policy as it was stipulated.

QUESTION PRESENTED

Whether, consistent with the First Amendment, a rural southern school board, acting pursuant to a Court ordered Fourteenth Amendment legal and affirmative duty to eliminate racial discrimination "root and branch" from its school system, may elect not to reemploy classroom teachers who send their own children to a racially discriminatory, segregated, all-white, secular academy.

STATEMENT OF THE CASE

In 1954, this Court rendered its historic decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) holding that segregated education in the public schools was inherently unequal for Black children. For almost fifteen years thereafter, there was virtually a total lack of conformity on the part of local school boards, particularly in the South, to the mandate of that decision.[4] Subsequently, in the late 1960's, this Court in *Green* v. *County School Board*, 391 U.S. 430 (1968), decreed that integration of the public schools could no longer be delayed, and charged school authorities with "the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437-38 (emphasis added). On August 9, 1968,

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(For the stipulation of the policy see A. 9 and 10). In addition, see footnote 14 infra. In the District Court, the Court of Appeals and in the Petition for Writ of Certiorari, Petitioners set forth the policy as stipulated and as contained above, not as now set forth in their Brief.

[4] For a history of the resistance to school desegregation in the South after *Brown*, see Read, "Judicial Evolution of the Law of School Integration Since *Brown* v. *Board of Education*". 39 Law and Contemporary Problems 7 (1975).

the United States District Court for the Northern District of Mississippi, directed the school authorities of the Calhoun County [5] school system to immediately desegregate that school system. (A. 383) Only twenty days after the desegregation order was entered by the District Court, the Calhoun Education Foundation Corporation was established for the purpose of operating a racially discriminatory all-white private academy, the Calhoun Academy.[6] (Pet. A. 31a; A. 72, 207-10, 259, 393 Respondent's Exhibit No. 6) After the Academy was established and began operating, some

[5] Calhoun County, Mississippi, is a small rural southern county. Its total population in 1970 was 14,623; 10,807 of which were white and 3,816 non-white. The per capita income in 1969 was $1,840.00 [Directory of Health, Education & Welfare Services, Northeast Mississippi, at 78, compiled by Memphis Regional Medical Program, under U.S. Department of Health, Education and Welfare Public Health Service Grant 5 603 RM-00051-05 A3 (1973)]

[6] The Calhoun Academy, along with other Mississippi private academies, lost its tax exempt status with Internal Revenue Service as a result of the decision of the United States District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971). The Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, presently does not have tax exempt status under Section 501(c)(3) of the Internal Revenue Code as a result of their failure to adopt racially non-discriminatory admissions policies. In addition, the Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, has not qualified to receive free textbooks from the State of Mississippi pursuant to *Norwood* v. *Harrison*, 413 U.S. 455 (1973). Also, substantial financial support to the Calhoun Academy is received from the Calhoun County Citizens Counsel (A. 259-61; A. 404-17, Respondent's Exhibit No. 7; A. 218-23; A. 328-35, Respondent's Exhibit No. 1) (Also, see Opinion of District Court 365 F. Supp. 855 at 857, n. 1). Irregardless of this Court's holding in *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (U.S. June 25, 1976), the Calhoun Academy, in this Brief, will be treated as a racially-discriminatory academy, since at the time the policy was adopted (November 1972), and Petitioners were not reemployed, that, in fact, is what it was.

of the teachers in the Calhoun County public school system enrolled and sent their own children to the Academy, causing controversy [7] among parents, teachers and students in the public school system. (A. 200-03, 211-12, 216-17) After considering the matter for some time, in November 1972, the school board adopted an oral policy which was never reduced to writing, as follows:

> (P)rior to the employment of a new teacher or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed. (A. 9)

The sole impetus for adoption of the policy was the racially discriminatory Calhoun Academy. (A. 189-90, 214-15) There were and are no religious private schools in Calhoun County. (A. 28, 189, 215) In fact, the *only* private school that has ever been in Calhoun County, was the racially discriminatory Calhoun Academy. (A. 28, 215) John Burt, the Superintendent of the Calhoun County public schools, stated that he had recommended the policy "in order to comply with the court order and to carry out the job of running the best schools . . . possible . . . in Calhoun County". (A. 141) Stating that in his own opinion that the fact that a teacher had a child in a private school would affect the per-

[7] The controversial climate existing in Calhoun County between the private school patrons and public school supporters can perhaps best be exemplified by the degree of division among families which occurred, even pitting brother against brother. Respondent Mallory, President of the school board, testified that his own brother sent his children to the Calhoun Academy and told him that "he didn't want his kids going to school with them niggers". (A. 201-202).

formance and efficiency of that teacher, expressed his concern that at the time the school system "needed total cooperation and dedication from all people concerned with the public school system." (A. 141) Respondent Hudson, the Principal of the Calhoun City Attendance Center, testified in response as to why the policy was adopted:

> Because we felt that the—in order to carry out the regulations of this Court in regard to the court order that we are operating under, we are directed to do everything that we can to promote the unitary system and to make it work to the best benefit of all people. And we feel that if a teacher had divided loyalties that her efficiency, productivity, is not going to—is definitely going to be affected (A. 27)

Paul M. Moore, the regular attorney for the Calhoun County Board of Education, testified that he had written to the United States Justice Department concerning the policy prior to its adoption. (A. 179-81, 391-92 Respondent's Exhibit No. 5) In the letter, Mr. Moore stated:

> The situation is that we have learned since entering into contracts with certain of the teachers in the School District, that they have children that they are sending to private schools. We have advised them that they cannot expect us to renew their contracts with them when they come up for renewal, which is normally in March, 1973. We have created quite a heated controversy in the community by so doing. All of the teachers, of course, are white. We are not absolutely positive at this point, but our best information is that there are nine children involved.
>
> I advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their action was correct. The board also feels that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children. (A. 392)

The Justice Department in response to this correspondence from the school board attorney, while specifically reserving comment on any due process or First Amendment issues which might be raised with respect to the policy (A. 402-3) and referring to the board's "affirmative duty" under *McDaniel* v. *Barresi,* 402 U.S. 39 (1972) and *Green* v. *County School Board,* 391 U.S. 430 (1968), advised that the Court orders under which the board was operating would not preclude the school board from the contemplated action. (A. 402-403)

After the response of the Justice Department was received, the policy was adopted by the school board in November, 1972, in an effort to comply with their affirmative duty to eliminate racial discrimination "root and branch" from the Calhoun County public schools. Other factors contributing to the adoption of the policy stemmed from the desire to assure the complete and total support, loyalty and dedication of the teachers and system personnel, in the difficult and trying times during the effort to establish a desegregated school system in Calhoun County and to further the best interest of the children in the school system by maintaining teacher effectiveness and performance. (A. 27, 141, 164, 211, 215, 391 Respondent's Exhibit No. 6)

Respondent R. W. Mallory, the President of the

Calhoun County Board of Education, testified as to the basis and intent in forming and adopting the policy that:

> Well, . . . we didn't think that a teacher that had kids we'll say in this . . . (Calhoun Academy) . . . would be dedicated to the public school system. A. 199-200.
>
> * * *
>
> These people that have kids in the private schools, especially at the time of the organization, were hard prejudiced against the public schools. Now, that was evident, you know, anywhere. Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought. That's our thinking on it. (A. 201)
>
> * * *
>
> There has got to be just a little friction you might say, or animosity between some of these people, you know, that teach at these—that have kids in the private school and public schools . . .
>
> Was that expressed to you in your community by people?
>
> Yes, sir. Now, this—now, we discussed this policy for maybe two or three years before we ever done anything about it. (A. 211)

With respect to the private school to which the policy was directed, Respondent Mallory testified:

> THE COURT:
> All right. Would it mean any private school? Is that what you understand the policy to be?
>
> THE WITNESS:
> Of course, we was just concerned——
>
> THE COURT:
> What school were you talking about?

> THE WITNESS:
> We were concerned with Calhoun Academy because that's the school that's in the county, the only one.
>
> THE COURT:
> Was any other private school ever in consideration?
>
> THE WITNESS:
> There was no other one discussed. No other one involved.
>
> (A. 189-90)
>
> * * *
>
> THE COURT:
> Did your policy expressly apply only to Calhoun Academy?
>
> THE WITNESS:
> No, sir, I mean, it didn't say so in the policy. But, of course——
>
> THE COURT:
> What was the intent?
>
> THE WITNESS:
> Well, that was the intent, because that was the only school involved, you know.
>
> THE COURT:
> That was the only private school in the County?
>
> THE WITNESS:
> Yes sir, only other school. (A. 214-15)

Mallory also testified that the school board, in adopting the policy, also considered the support given to the Academy by the Citizens Counsel and the publicity this support received throughout Calhoun County. (A. 218-219, see Collective Defendants Exhibit 1, A. 328-335; Exhibit 7, A. 404-417)

Two educational psychologists testified, uncontradicted, that the school board's action was reasonably and significantly related to the job performance and effectiveness of a classroom teacher. It was their opinion that the action on the part of the school board was imperative if the best interests of the Calhoun County public school children were to be served. These psychologists stated that the children in the classes of a teacher sending his own child to a racially discriminatory, all-white, private school, would perceive the teacher was rejecting them and derive a sense and feeling of inferiority. A general negative educational atmosphere prevails. The expectations of the teacher of the performance of the public school children would necessarily be lower, and as a result, these children would not achieve their highest educational level. Accordingly, the classroom effectiveness and performance of the teacher is affected. (A. 99-105; 117-27; 174-75)

The Petitioners themselves, while espousing various reasons for sending their children to the Academy, were revealed to be much more than just "passive" supporters of the Academy. Petitioner Wright, for example, while admitting she was not dedicated to the concept of desegregated school systems (A. 95), was a member of the "patrons" (mothers organization) and a "homeroom mother" of the Academy and actively participated in raising funds for the Academy during the time which she was teaching in the Calhoun County public school. (A. 91) Mrs. Wright spent substantial time and energy involved in the work and activities of the Academy and expressed a feeling of responsibility to the Academy. (A. 91) She placed her son in the Academy immediately after the first year of full integration of the Calhoun County public schools (A. 89) and her daughter has never attended the public schools,

only the Academy. (A. 95) Petitioner Adams stated that she had sent her child to the Academy because of a speech problem.[8] (A. 41) However, the Calhoun Academy had no speech therapist (A. 47) while the Calhoun County public schools had several, and the therapist at the Calhoun City Attendance Center where Petitioner taught, and her child would have attended, was black. (A. 142-143) Mrs. Adams' husband taught at the Grenada Lake Academy, a private school in adjoining Grenada County. (A. 41) Petitioner Cook, after not being rehired by the public schools, immediately became the Headmaster (Principal) of the Calhoun Academy.[9] (A. 72)

Prior to the end of the 1972-1973 school year, the Petitioners, Billy D. Book, Loula Juanita Adams, and Mrs. W. P. Wright, were advised that if their children were enrolled in the racially discriminatory Calhoun Academy for the coming school year, they would not be reemployed by the school board. Accordingly, the Petitioners were not rehired for the 1973-1974 school year.[10]

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[8] Petitioner Adams did not advise the public school officials that her child had a special problem after being informed that she would not be reemployed. (A. 60).

[9] Petitioner Cook gave as his reason for sending his child to the Academy that he preferred not to have his child on the same campus with him. (A. 62-63). His child presently attends school on the same campus where he works, the Calhoun Academy. (A. 75-76; 82-83).

[10] None of the Petitioners have made applications for employment in the Calhoun County public schools since the adoption in 1974 of Section 37-9-59 of the Mississippi Code of 1972, nor did they request re-instatement pending appeal.

SUMMARY OF ARGUMENT

Although Petitioners have a right to send their children to educational institutions that promote a belief in racial segregation, they have no right of "non-association" with black children in the educational environment. *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (U.S. June 25, 1976) The real right at issue in this case is the right of black children to equal educational opportunity free of racially discriminatory overtones. *Brown* v. *Board of Education*, 347 U.S. 483 (1954)

The Respondent school board acted pursuant to an affirmative duty, required by the Fourteenth Amendment, to take whatever steps were necessary to eliminate all vestiges of racial discrimination "root and branch" from the school system under their charge. *Green* v. *County School Board*, 391 U.S. 430 (1968); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)

Petitioners' overbreadth attack on the school board's policy must fail. Subsequent to the decision of the District Court, Mississippi enacted Section 37-9-59 of the Mississippi Code of 1972 prohibiting school districts from denying employment or reemployment to teachers because that teacher's child does not attend the school system in which he is employed. This statute's existence forecloses the board's policy from having a "chilling effect" on anyone.

Because of this absence of a "deterrent effect" of the policy on other persons, and a readily apparent construction of the policy limiting it's application to the Calhoun Academy, the only private school in Calhoun County, it withstands the overbreadth attack. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

Public necessity justifies the restriction of Petitioners' association rights and conduct because of their "segregation overtones," when *limited to the transitional period* necessary to accomplish school desegregation. During this period of time, a school board may constitutionally burden associational rights to guarantee the accomplishment of a Fourteenth Amendment mandated school system free of all vestiges of racial discrimination. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Brown* v. *Board of Education, supra; Augustus* v. *School Board of Escambia County*, 507 F. 2d 152 (5th Cir. 1975)

The regulation does not deny Petitioners the right to send their children to the Calhoun Academy, it only prohibits their employment if they do. *Keckeisen* v. *Independent School District*, 507 F. 2d 1062 (8th Cir. 1975) cert. denied 44 U.S.L.W. 3719 (1976). The Constitution does not confer upon Petitioners the right to reemployment in the Calhoun County public schools because of the resulting denial of the Fourteenth Amendment right of public school children to an equal educational opportunity. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) The Petitioners, by their conduct, communicated to public school children and the general public the label that the public schools were "inferior". *Green* v. *County School Board*, 391 U.S. 430 (1968) required the school authorities to correct this discriminatory situation.

The absence of a school desegregation order definitively distinguishes *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and *Elrod* v. *Burns*, 44 U.S.L.W. 5091 (June 28, 1976) from this action so that their guidelines are not readily applicable. In any event, the concern of the school board in eliminating all vestiges

of racial discrimination from the schools in their charge is a vital and compelling interest, requiring, under any balancing of interest test, the scales to tip in favor of its action. The policy constitutes a reasonable restraint upon Petitioners' associational rights.

Finally, because of the school board's overriding interests, to the extent that *Pickering's* guidelines would allow a situation to develop which would thwart or infringe upon the implementation of an outstanding school desegregation order, it should be overruled or at least made inapplicable during the transition period necessarily attendant to school desegregation.

ARGUMENT

I.

The Real Right in Issue

Petitioners, relying upon *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S. June 25, 1976), assert that the right in issue before the Court involves these three teachers' "basis, fundamental right to send his or her child to any school of his own choosing without interference from the state." (Petitioners' Brief 22) In *Runyon,* this Court recognized that:

> . . . it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood* v. *Harrison,* 413 U.S. 455, "the Constitution . . . places no value on discrimination." *id.,* at 469, and while "(i)nvidious *private discrimination* may be characterized as a form of expressing freedom of association protected by the First Amendment . . . *it has never been afforded affirmative constitutional protections.* (44 U.S. L.W. at 5039, emphasis added)

The *real* right [11] in issue before this Court is the right of black school children attending the public schools of Calhoun County to the full equal educational opportunity [12] promised in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and reaffirmed in *Green* v. *County School Board,* 391 U.S. 430 (1968); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971) and by the District Court's Order of August 8, 1968 in *United States* v. *Calhoun County Board of Education,* No. WC 66-37 (N.D. Miss. 1968). Surely, if Petitioners have a right of sending their children to educational institutions promoting belief in racial discrimination, these black chldren have a right to attend public schools free of the pervasive influences of the lingering remnants of racial discrimination. It is the rights of these public school children that is the real right in issue before this Court.

In addition, by virtue of *Runyon's* holding that 42 U.S.C. Section 1981 prohibits private, commercially operated, non-sectarian schools from denying admis-

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[11] If it is true, as recognized in *Runyon,* that the Private School Association had standing to assert the rights of its member schools' patrons (44 U.S.L.W. at 5039, footnote 13), then correspondingly, Respondents here have standing to assert the rights of the children, both black and white, in attendance at the Calhoun County public schools under *Brown I* and its progeny.

[12] It should be beyond question that the economic status of the vast majority of blacks in Mississippi, particularly Calhoun County, prohibits their entrance in any schools other than public schools. (See footnote 5 supra) In this regard, *Runyon,* has no practical effect whatsoever on black school children in the rural South.

sion to prospective students because they are black, it logically follows that Petitioners, and their children, have no right of "non-association" with black children in such private schools. Since private, commercially operated, non-sectarian schools, such as Calhoun Academy, after *Runyon,*[13] cannot discriminate only on the basis of race, Petitioners have (or had) no right to send their children to such a school, i.e., one which discriminates on the basis of race. It has been observed that "(w)e have to associate with anybody who has the right to be there. The question of our right not to associate with (someone) is concluded when we decide whether he has a right to be there." Black, "Lawfulness of the Segregation Decisions", 69 Yale L.J. 421 (1960).

II.

The Duty of the School Board

At the time the policy was adopted and the Petitioners were not rehired, the Respondent school authorities were charged with the continuing affirmative duty to take whatever steps might be necessary to eliminate from the public schools all vestiges of racial discrimination root and branch. *Green* v. *County School Board,* 391 U.S. 430, 437-38 (1968); *McDaniel* v. *Barresi,* 402 U.S. 38, 41 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971). Indeed, this Court observed in *Swann*:

[13] It should be remembered that at the time the policy herein under attack was adopted, and the action of the school board with respect to the Petitioners was taken, the Calhoun Academy was a racially discriminatory, all-white academy, established in the wake of public school desegregation to provide a haven for "white flight." District Court Opinion, 365 F. Supp. at 857 (N.D. Miss. 1973).

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. * * * (S)chool authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'.
>
> * * *
>
> If school authorities fail in their affirmative obligations . . . judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Id.,* at 15.

The school board, mindful of this duty, and acting thereunder, undertook the questioned action against the Petitioners. (A. 27, 141, 179-81, 391-92)

III.

The Overbreadth Attack on the Policy Must Fail

Petitioners assert that the policy in question is overbroad both as written[14] and as applied. Although "as

[14] It should be noted that the arguments of Petitioners in their Brief are not directed to the policy as stipulated. The school board's policy was an oral policy, not reduced to writing either before or after adoption. (A. 9) The policy was stipulated by counsel for Petitioners and counsel for the school officials as follows:

> THE COURT:
> Well, can we agree on the verbiage of the regulation? Can counsel do that and state it into the record?
>
> MR. FARESE:
> Quote, a policy was formulated wherein 'prior to the employment of a new teacher or the reemployment of an existing teacher the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend

applied" to the three petitioning teachers, the policy reaches not only the "hard core" activity it sought to curb, but the *only* activity it was intended to circumscribe, (A. 189-90, 214-15) the contention of the Petitioners is that "as written" and "as applied," the policy has a "real, substantial, chilling effect" on other teachers in the system who may elect not to utilize the Calhoun County public school system for the education of their children, i.e. other racially nondiscriminatory private schools.[15] Petitioners attempt to rest upon the principle that even though their own conduct is "hard core" within the intent of the policy, they allege "standing" to attack the policy for what they contend is its "chilling effect" on other teachers in the Calhoun County public school system. The overbreadth attack on the policy must fail.

The overbreadth doctrine is not applicable to this case in its present posture before this Court. Subsequent to the decision of the District Court below, Mississippi enacted into law what is now Section 37-9-59

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the public schools of said Calhoun County or said teacher would not be employed or reemployed'.

THE COURT:
Is that——

MR. HICKMAN:
That is the policy.

THE COURT:
You agree on the words of the policy?

MR. HICKMAN:
I agree on the words. (A. 9, 10) (Also see A. 32).

[15] It cannot be disputed that there are or were any such "other" racially-nondiscriminatory private schools in Calhoun County.

of the Mississippi Code of 1972, Annotated, as amended, which provides:

> The governing authorities of every school district in this state are hereby prohibited from denying employment or reemployment to any person as a superintendent, principal or teacher . . . or as a noninstructional personnel . . . for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, teacher, or noninstructional personnel is employed.

Because of this legislative proclamation, the policy, by which the Petitioners were denied reemployment in the Calhoun County public schools, cannot have a "chilling effect" on anyone. Because of the conspicious absence of the "chilling effect" premises, an element which is crucially vital to Petitioners argument that the policy should be struck as being overbroad, this fact alone should be dispositive of the applicability or nonapplicability of the overbreadth doctrine to the school board's regulation. This Court has accepted far lesser assurances of the absence of future chilling effect than that which is herein present. *Grenede* v. *Board of Supervisors of Elections,* 341 U.S. 56 (1951). Similarly, this Court has prefaced overbreadth scrutiny on the possibility of future restrictive interpretations and applications of a perhaps facially overbroad statute. *Harrison* v. *N.A.A.C.P.,* 360 U.S. 167, 177 (1959). If the regulations under question is susceptible to an appropriately restrictive interpretation and application, this Court has generally found that the regulation is not void for overbreadth. In the present case, not only is this criteria met, but a sweeping interpretation or application is foreclosed.

Even if the legislative enactment were not wholly dispositive of the overbreadth attack on the policy, it is an unlikely candidate for overbreadth scrutiny as it is totally outside of the traditional criteria for overbreadth voidance. Resting at the heart of the traditional principles underlying constitutional jurisprudence is the concept that one to whom a regulation may constitutionally be applied will not be granted a license to challenge the regulation on the basis that it conceivably may be unconstitutional in its application to other persons in circumstances not before the Court. *Broadrick* v. *Oklahoma,* 413 U.S. 601 at 610 (1973). The "as applied" doctrine[16] has been imposed by this Court upon itself so as to restrain the exercise of its power to pass on the constitutional validity of regulations. *United States* v. *Raines,* 362 U.S. 17, 20-21 (1950). However, as recognized in *Broadrick,* due to "weighty countervailing policies" this principle is not without exception. Petitioners maintain that they should be allowed to invoke the exception grounded in the area of First Amendment rights. *Young* v. *American Mini Theatres, Inc.,* 44 U.S.L.W. 4999 (June 24, 1976); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). Even where claimed First Amendment rights (here, association) are involved, "if the statute's deterrent effect[17] on legitimate expression is not both real and

[16] For an analysis of the "as applied" method, see Note, "The First Amendment Overbreadth Doctrine", 83 Harv. L. Rev. 844, 847-52 (1970).

[17] See *Lecci* v. *Cahn,* 493 F. 2d 826 (2nd Cir. 1974) where the Court observed:

> The complaint rests solely upon the theory that the statute has a chilling effect upon First Amendment rights. In United Public Workers v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L. Ed. 754 (1947), the Supreme Court, upholding the constitutionality of the Hatch Act's ban on federal employee

substantial" and if a limiting construction[18] or partial invalidation so narrows the regulation so as to eliminate apparent threat or deterrence to constitutionally protected expression, the regulation is allowed to escape a declaration of total voidness for overbreadth. *Broadrick, supra,* at 613, *Dombrowski* v. *Pfister,* 380

> participation in partisan political activities, indicated that allegations of subjective chill were not an adequate substitute for a claim of present objective harm or a threat of specific future harm. That holding was reiterated in Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed. 2d 154 (1972). See also Fifth Ave. Peach Parade Comm. v. Gray, 480 F. 2d 326 (2nd Cir. 1973). The court below considered that Mitchell had been overruled and was not binding. In view of the recent Supreme Court holdings in United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973) and Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed 2d 830 (1973), it is quite obvious that the rumors of Mitchell's demise have been somewhat exaggerated. The "chilling effect" standing position of Dombrowski v. Pfister, 380 U.S. 479, 491-492, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965) does not survive *where the statute challenged for overbreadth regulates conduct rather than speech which is clearly the thrust of the statute here attacked.* See Broadrick v. Oklahoma, supra. We have been reminded by Mr. Justice White in Broadrick that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." (*Id.,* at 826) (emphasis added)

[18] Both the District Court and the Court of Appeals accepted a "limiting construction" of the policy, i.e., it only has reference to Calhoun Academy. The District Court stated:

> We hold that the board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools. (365 F. Supp. at 860).

Judge Roney on the Court of Appeals observed:

> I would not get to the question of the validity of the general policy unrelated to this specific case of Court ordered desegregation. This case, to me, does not have broad applications. (515 F. 2d at 750).

U.S. 479, 491 (1965); *Harrison* v. *NAACP,* 360 U.S. 167 (1959) (possibility of limiting construction). The attack upon the policy in this action fails both of these standards. First, there can be no deterrent effect on others in circumstances unlike the Petitioners. The only circumstance to which the policy can be applied is to teachers, like Petitioners, who send their children to the racially discriminatory Calhoun Academy while teaching in the public schools of Calhoun County. That this is so is self-evident by the fact that the only private school in Calhoun County is the Calhoun Academy. Secondly, when considered in the context in which it was adopted, and in light of the clear intent motivating the school board, the policy may reasonably be read to apply only to the Calhoun Academy. Indeed, the trial judge observed, ". . . the school board, the plaintiffs, and the local community understood that the regulation was adopted, and has been applied, only to public school teachers who patronize the racially discriminatory private school". (365 F. Supp. at 855)

In this regard, consideration should be directed to the reality that the school board's policy was not a meticulously drafted and printed legislative enactment, drafted by expert and experienced legislators. This Court has observed:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 578-79 (1973).

This policy, reduced to writing only by stipulation after the fact (A. 9) should be viewed in light of the circumstances which acted as its catalyst. The focus of "facial" analysis should be directed on what the regulation meant. Facial analysis is aided by the legislative history of the regulation and other available sources to explain its meaning. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973). Substance, not semantics, should govern. The "legislative history" of the policy and the circumstances in which it was adopted preclude any other view but that the regulation was a response to a particular pressing problem at a particular point in time, which the school officials felt possessed a threat to the successful implementation of the District Court's desegregation order.

In the area of school regulations, some impreciseness had been allowed, leaving to school officials the duty of acting responsibly in the application of a broad or imprecise regulation. *Murry* v. *West Baton Rouge Parish School Board,* 472 F. 2d 438 (5th Cir. 1973) *Gisner* v. *Stanford Board of Education,* 440 F. 2d 803 (2nd Cir. 1971).

Also important is the volume of state prosecutions which, of necessity, would be compelled for clarification of the meaning of the policy. *Dombrowski* expressed concern that the valid application could be separated from the invalid one only by "hammering out the structure of the statute piecemeal." *Id.,* 380 U.S. at 491. Overbreadth, doomed the statute in *Dombrowski* due to the absence "of a readily apparent construction . . . as a vehicle for rehabilitation of the statute in a single prosecution." *Id.* at 491. The major concern is that the regulation will not be rewritten in

a flood of litigants blood. The action of the Mississippi legislature in the adoption of Section 37-9-59 of the Mississippi Code assures that not a single drop will be shed in the limiting or narrowing of the school board's regulation. However, even in the absence of such legislative action, the clear line which is apparent can be established in a single litigation. Accordingly, the overbreadth attack on the policy must fail.

IV.

During the Transition Period from a Dual to a Unitary School System, a School Board, Acting Under a Court Ordered Duty to Eliminate all Vestiges of Racial Discrimination "Root and Branch" from its System, May Constitutionally and Justifiably Burden Teachers Associations Rights Involving Conduct with "Segregation" Overtones Due to Pressing Public Necessity

The Court has recognized the concept that pressing public necessity may sometimes justify the existence of the restrictions of some civil rights, given the circumstances surrounding such limitation at a given point in time, whereas three or four years later such restrictions would not be justifiable or valid. See *Korematsu* v. *United States,* 323 U.S. 214 (1944). This concept may readily be applied to the present case before the Court. Given the circumstances as they existed at the time the policy was effectuated, and the action involving the Petitioners were taken, this Court may readily find that the public necessity, when viewed in light of *Brown, Green* and *Barresi,* and the other mandates of this Court and the lower federal Courts, commanding the elimination of racial discrimination in the public schools, was a justification for the burdening of Petitioners' rights at that time. This is true even though such action may not be justifiable or needed four or five years thereafter. Since the elimination of racial

discrimination from the public schools, during the late 1960's and early 1970's, and as will be shown, constituted an overriding compelling government interest, it is reasonable to assert that during this transition period required to achieve this goal, some rights, even First Amendment rights, should give way to guarantee the accomplishment of that Fourteenth Amendment goal. In the school desegregation area, that concept is strengthened by *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (5th Cir. 1970) and the subsequent application of its standards dependent upon whether a school district had achieved unitary status or whether it was still in the transition period. *Singleton* set forth guidelines for faculty desegregation in school systems during the transition period. During this period, some white teachers, solely because of their race, lost their jobs to black teachers as a result of the *Singleton* guidelines. e.g. *Lee* v. *Macon County Board of Education,* 483 F. 2d 242 (5th Cir. 1973). However, once a school system passed through the transition period and became fully unitary, *Singleton* no longer applied. *Thompson* v. *Madison County Board of Education,* 476 F. 2d 676 (5th Cir. 1973). The key to the inquiry is whether a school district is still in the process of implementing the desegregation order of the Court or whether desegregation has already been completely achieved. Some school districts are no longer controlled by the *Singleton* criteria, having accomplished the goal of a fully unitary school system. *Picken* v. *Okolona Municipal Separate School District,* 380 F. Supp. 1036 (N.D. Miss. 1974) aff'd 527 F. 2d 358 (5th Cir. 1976).

Another case illustrating this approach is *Augustus* v. *School Board of Escambia County,* 507 F. 2d 152 (5th Cir. 1975), wherein after the District Court had

permanently enjoined the use of the nickname "Rebels" and the use of the Confederate Battle Flag as the school symbol, the Court of Appeals admonished the District Court to examine school regulations aimed as "symbolic irritation" for effectiveness in achieving the elimination of discrimination root and branch, modified the order to provide for a temporary injunction observing:

> There is an additional reason why the permanent injunction entered by the District Court must be modified. The Federal Court will relinquish jurisdiction when the remedy required by the original suit, the establishment of a unitary school system, has been fully achieved. At that time . . . any ancillary orders entered to aid the implementation of the court-ordered remedy should no longer be necessary. *Id.* at 158.

The Court went on to state that remedies of this type "should be imposed" so long as might be necessary to achieve the purpose of preventing the interference with the desegregation orders of the Court. *Id.* at 158.

This conceptual approach is perhaps the most readily justifiable guideline for the adjustment of the conflicting rights presented by this action.

V.

The School Board's Regulation and Action Thereunder Is Not a Denial of Petitioners' Right to Send Their Children to the Calhoun Academy. The Constitution Does Not Confer Upon the Petitioners the Right to Demand Reemployment in the Calhoun County Public Schools, as it Results in the Denial of Equal Protection of the Laws to the Public School Children of Calhoun County

The action of the Calhoun County school board under the November 1972 regulation, was not a denial or prohibition of Petitioners' assumed right to send their

children to the racially-discriminatory Calhoun Academy, but rather, at the most, constituted a "burdening" of such right. Accordingly, less of a state interest justification to support the action of the school authorities is required. In *Keckeisen* v. *Independent School District,* 509 F. 2d 1062 (8th Cir. 1975), cert. denied 44 U.S.L.W. 3719 (1976) the Court of Appeals upheld a regulation enacted by a school board providing that it would not employ administrators and teachers who were married to each other. Expert testimony in favor of the regulation was adduced at the trial. Plaintiffs challenged the constitutionality of the policy claiming it was an infringement of their fundamental right to marry. The Court, rejecting Plaintiff's argument, stated:

> The policy in question here does not deny the two people the right to marry; it only prohibits the employment of married couples in administrator-teacher situations. *Id.* at 1065.

Keckeisen is readily analogous to Petitioners' claims. Seeking to defeat the regulation as a denial of their right to send their children to the Calhoun Academy, Petitioners fail to discern that the action of the school board does not deny them such right, it only prohibits their employment if they do send their children to the Academy.

Petitioners *demand* employment in the public schools of Calhoun County irregardless of the school system's educational interests. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948). As applied to this case, the Constitu-

tion does not confer upon the Petitioners the right to demand reemployment in the Calhoun County public schools because of its resulting denial to the public school children of Calhoun County, the *Brown I* based Fourteenth Amendment guarantee of an equal educational opportunity free of overtones of racial inferiority. This Court distinctly observed in *Norwood* v. *Harrison,* 413 U.S. 455 (1973) that:

> Under *Brown* v. *Board of Education,* 347 U.S. 483 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. *Id.,* at 469.

Similarly, a teacher in Calhoun County who sent his child to the Calhoun Academy, under the polarized conditions existing in that county at the time the school board's policy was adopted, manifested, by such action, a belief in the desirability of segregated education not only to his students but the entire community. Such teacher was choosing sides. The Petitioners, inevitably cast in a role model to their students, openly stood forth upon a platform provided by the school board, financed by the school board and proclaimed, by such action, "I do not believe white children should go to school with you. This school is inferior. You are not good enough to go to school with my child, because you are black. You are not equal." Such a communication, whether intentional or not, cannot be allowed by a school board under the affirmative duties imposed by *Green.* District Judge McMillan, in a Supplemental

Opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 362 F. Supp. 1223 (W.D. N.C. 1973), has stated:

> It may be that some of the continuing discrimination is unintended or accidental; some of it may be the result of inertia and the instinctive habits of centuries—old duration; some Board members, no doubt, are unaware of much of it. As a constitutional matter, however, it does not seem to make much difference whether discrimination is the consciously intended result; responsible public servants, like the mythical "reasonable man" of the law, may be presumed to intend the natural and probably consequences of their actions and defaults; if conscious policies and actions produce or restore segregation, or have the effect of labeling a school as "inferior", those policies are discriminatory and must be corrected. (*Id.,* at 1237)

Since the conduct of the Petitioners communicates to public school children and the public that their belief that the public school system is inferior, such action, be it conscious or unconscious, is inconsistent with the board's duty under *Green.*

VI.

Pickering Provides No Guideline Due to the Circumstances of this Case; However, to the Extent that Pickering Infringes Upon the Affirmative Root and Branch from its Public Schools, it Should be Overruled or at Least Distinguished and Made Inapplicable During the Transition Period from a Dual to a Unitary System

Both the Petitioners and amicus curiae National Education Association labor tediously, expending considerable effort arguing that Petitioners' right to send their children to a segregated academy may be in-

fringed upon if such actions pose a "substantial threat of material interference with a legitimate school function", relying upon *Healy* v. *James,* 408 U.S. 169 (1972), *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969) and *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). None of these cases provide a proper guideline for the issues presented to this Court by this appeal. The definitive distinguishing characteristic between *Healy, Tinker* and *Pickering* and the present case is that in none of those actions was there a school board involved which was "clearly charged with the affirmative duty *to take whatever steps may be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." *McDaniel* v. *Barresi,* 402 U.S. 39, 41 (1971); *Green* v. *County School Board,* 391 U.S. 430, 437-38 (1968) *Healy, Tinker* or *Pickering* did not involve the exercise of constitutional rights entangled with desegregation overtones, nor did they involve the frustration, directly or indirectly, of outstanding Court desegregation orders. Petitioners rely upon a passage from *Healy,* that "[t]he government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those goals." Although *Healy* provides no guidelines for the present action, due to its obvious difference in circumstances with the situation involved here, it becomes obvious that first, in light of *Runyon,* the goals and aims of the Calhoun Academy are unlawful and which goals Petitioners not only knew about, but ascribed to, and secondly, not only did Petitioners display a specific intent to further these goals, but were *actively* involved in their furtherance. (See text accompanying footnotes 8 and 9, supra) *Healy, Tinker* and *Pickering* provide no standard by which to measure this action.

However, to the extent those cases might provide a guideline for this action, "the problem . . . (presented) . . . is to arrive at a balance between the interest of the teacher, as a citizen . . . and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* at 568. Under any balancing of interest test applied to the circumstances of this action, the scales must come down on the side of the school board. We first must begin with the *Brown I* recognition that ". . . education is perhaps the most important function of state and local governments." 347 U.S. at 493. Other Courts have stated that "[t]he interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty to further and protect the public school system." *Burnside* v. *Byars,* 363 F. 2d 744, 748 (5th Cir. 1966); *Freeman* v. *Flake,* 448 F. 2d 258, 261 (10th Cir. 1971), cert. denied 405 U.S. 1032 (1972). Add to this the fact that "[t]here is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground . . . [and] . . . [t]hat government interest is dominant over other constitutional interests to the extent that there is a complete and unavoidable conflict." *Green* v. *Connally,* 330 F. Supp. 1150, 1167 (D.C. 1971) (emphasis added). Since *Tinker* recognized that First Amendment rights of teachers must be applied in light of the *special* characteristic of the school environment (393 U.S. 506), and given the school board's broad affirmative duties under *Green, Barresi* and *Swann,* any balancing of Petitioners' associational rights against the board action must be viewed in the full context of the elimination of all forms of

racial discrimination, "root and branch", from the public schools of Calhoun County. Among the government interests weighing in favor of the school board are (1) the compelling interest in meaningful public education, (2) the affirmative duty of the Calhoun County public school officials to eliminate racial discrimination root and branch, (3) assuring the complete and total support, loyalty and dedication of the public school teachers in Calhoun County to the system, its duties and goals during the transition period to a unitary system, (4) eliminating a pervasive influence on the educational process of the public schools of Calhoun County, and (5) maintaining appropriate classroom effectiveness and performance of its teachers. Weighing against these government interests and in favor of Petitioners, is the *Runyon* right to send their children to an educational institution promoting the belief that racial segregation is desirable, a right, which "has never been afforded affirmative constitutional protections." *Id.*, 44 U.S.L.W. at 5039. It deductively follows, therefore, that even under *Pickering* guidelines, the regulation should prevail.

In any event, to the extent that *Pickering* infringes upon the affirmative duty of a school board to eliminate racial discrimination root and branch from its public schools, it should be overruled or at least distinguished and made inapplicable during the transition period from a dual to a unitary system. Any teachers' action or conduct, even though protected under *Pickering,* which results in the impairment of a school desegregation order, cannot, as a matter of public necessity, be accorded a "perferred constitutional status" over the Fourteenth Amendment guarantee of equal education opportunities. Public necessity and the

Fourteenth Amendment demand no less. Allowing a teacher's conduct to impede the orderly process of complete desegregation of the public schools, would seriously undermine the commitment to that goal and confront school authorities with the dilemma of how they are to carry out the mandates of the Federal Courts when those, who by their own admission are diametrically opposed to the same, are allowed to openly flaunt the Court ordered goals of the education institutions. As recognized by Mr. Justice Black in his dissent in *Tinker,* "[t]he truth is that a teacher . . . no more carries into a school a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic Church or Jewish Synagogue." 393 U.S. 521, 522. Quoting with approval from *Waugh* v. *Mississippi University,* 237 U.S. 589, Justice Black emphasized that:

> . . . membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. (393 U.S. at 522, 523).

Such are the circumstances of this case.

VII.

The Elimination of all Vestiges of Racial Discrimination from the Public Schools is an Overriding Vital Government Interest and Reasonably Permits the Burdening of Petitioners' Rights

Petitioners, relying upon *Elrod* v. *Burns,* 44 U.S. L.W. 5091 (June 28, 1976), further assert that the school board's regulation is a per se violation of their First Amendment rights because of what is termed

"guilt by association". As has been shown with respect to *Pickering* and *Tinker, Elrod* presents no directly in point precedent or guidelines for dealing with the situation which this appeal presents because of the conspicious absence of a court ordered affirmative duty involving racially discriminatory overtones. Nevertheless, under *Elrod,* if the government interest is "one of vital importance" and the benefit to be gained outweighs the incurred loss of protected rights, in appropriate circumstances, a burdening of those rights will survive constitutional challenge. Such is the case here. The benefit to be gained, the elimination of racial discrimination in public schools, outweighs the curtailment of the Petitioners' protected right to send their children to the Calhoun Academy.

Petitioners' criticism of *Adler* v. *Board of Education,* 342 U.S. 485 (1952) is misplaced. Although the "privilege-benefit" reasoning contained in *Adler* was rejected *by Keyishinan* v. *Board of Education,* 385 U.S. 589 (1967) and buried by *Elrod,* that portion of *Adler* which, as described by one Judge below, holding:

> "that persons employed or seeking employment in public schools have no right *to do so on their own terms,* that to maintain the integrity of public schools as part of an ordered society school authorities have the *right* and the *duty* to screen teachers in a relevant manner, not inconsistent with *basic* civil rights. (511 F. 2d at 749)

is not inconsistent with *Pickering's* "balancing of interest" approach and *Elrod's* "weighing" method. As long as basic civil rights are not *unreasonably* infringed for impermissible reasons (i.e. absence of vital government interest) government may burden some activ-

ities of its employees. *Elrod* recognized that "the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." 44 U.S.L.W. at 5095. Simply stated, this case presents the question: Is the elimination of all vestiges of racial discrimination from the public schools enough of a "vital government interest" to permit the burdening of the Petitioners' right to send their own children to a racially discriminatory academy in the context and environment of Calhoun County existing at the time such burden was imposed by the school board? We answer that question in the affirmative. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." *Swann* v. *Charlotte- Mecklenburg Board of Education,* 402 U.S. 1, at 13 (1970).

Although dealing with partisan political activities, *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 565 (1973) made reference to the importance that not only must government and its employees avoid the practice of favoritism, but also recognized how critical it is for its appearance to the public be avoided. The recognition of the importance of avoiding even improper government appearance should aid in the adjustment of the conflicting rights in this case. With respect to the school environment, in *Miller* v. *School District Number 167, Cook County, Illinois,* 495 F. 2d 658 (7th Cir. 1974) rehearing denied 500 F. 2d 711 (1974). Judge Stevens, now Justice Stevens, observed:

> . . . the public's reaction to an official, and a student's reaction to his teacher, is undoubtedly affected by the image he projects. *Id.,* at 667.

* * *

> Although the interest of children in associating with persons of their choice is, of course, severely limited by both their parents and the State, we should not ignore the fact that they do have a valid interest in not being compelled to associate with persons they or their parents consider objectionable. In the classroom, since their presence is compelled, they necessarily must look to the school board for protection of this interest. For this reason, it is appropriate for the school board, elected by the local community, to select the people with whom it wants the minors of the community to associate as teachers. *Id.*, at 667.

The Calhoun County Board of Education accepted the mandate of this Court in *Green* and *Barresi* at face value. They took affirmative action to eliminate a situation which was thwarting the implementation of an outstanding school desegregation order. As recognized by the District Court:

> the board was persuaded that the challenged rules was needed to eliminate racial discrimination from the public schools. Public school desegregation in Calhoun County was a controversial policy which caused a division in the community; many citizens immediately threw their support to continuing racial segregation in a private school to operate in competition with the public schools. Since white flight may present a serious obstacle to effective desegregation, a school board is empowered to adopt appropriate measures in aid of the schools under its charge. Defendants, without dispute, acted with no purpose or motive other than to strengthen local support for the public schools by requiring its teachers to give their undivided loyalty to the unitary school system and forego allegiance as patrons of schools practicing racial discrimination. 365 F. Supp. at 860.[19]

[19] Petitioners zealiously attack these findings of fact by the District Court and relying upon *Pickering* v. *Board of Education*, 391 U.S. 563, call for an independent review of the record. In *Pickering*, the review was made because the trial court had made *no* findings of fact on its own, but rather the fact finding body was the victim of the Plaintiffs' letter, i.e., the Defendant School Board. *Id.*, at 568 n. 2 No *de novo* consideration had been given the facts of the case by any Court. In *Pickering* the Court did recognize that:

> . . . even in cases where the upholding or the rejection of a constitutional claim turns on the resolution of factual questions, we . . . consistently give great, if not controlling, weight to the findings of fact of the (trial) courts. *Id.*, at 579 n. 2.

The findings of fact by the District Court comes before this Court, "well armed with . . . buckler and shield" and should not be set aside unless they are "clearly erroneous". *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364 (1947); *Horton* v. *U. S. Steel Corp.*, 286 F. 2d 210 (5th Cir. 1961); Federal Rules of Civil Procedure, Rule 52(a). Judge Roney, in expressing his views in the panel decision, expressly stated that the findings of fact of the District Court were not "clearly erroneous" and rested his affirmance upon "the findings of fact as they apply to these individual plaintiffs". 511 F. 2d at 750.

When viewed in its entire context, the action of the school board must be upheld. There can be no compromise of nor regression from, the realization of *Brown's* promise of an equal educational opportunity for all, free of racial overtones.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, et al., Petitioners

v.

ROGER W. HUDSON, et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE SUPPLEMENTAL BRIEF

Oral argument on this case was heard on November 1. On that day a motion to reconsider the denial of the National Education Association's motion to participate as amicus was granted. This presentation, as contrasted with that of the respondents, argues that the case should be dismissed as an improvident grant. Inasmuch as petitioners had no opportunity to file a reply brief on this issue prior to argument and in light of the fact that a significant portion of the Court's time was spent during oral argument discussing the issue, petitioners now request leave of Court to file a brief limited to the issue of utilizing the improvident grant technique to dispose of the case.

Respectfully submitted,

George Colvin Cochran

George Colvin Cochran
Counsel for Petitioners

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No. 75-503

BILLY D. COOK, et al., Petitioners

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SUPPLEMENTAL BRIEF

Petitioners in this case were terminated from their positions following the 1972-73 school year. Subsequent to that event and following the United States District Court decision, the Mississippi Legislature enacted the following statute:

> The governing authorities of every school district in this state are hereby prohibited from denying employment to any person as a superintendent, principal or teacher . . . or as a noninstructional personnel . . . for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, teacher, or noninstructional personnel is employed. [MISS. CODE ANN. § 37-9-59 (March 27, 1974)]

With respect to this provision as it relates to the procedural posture of the instant case petitioners bring the following to this Court's attention:

(1) This is a damage suit claiming back pay. Passage of the statute in no way affects damages accrued up to the point of enactment and therefore any claims with respect to mootness are misplaced.

(2) Pursuant to advice of counsel, petitioners have not applied for reemployment in the period subsequent to enactment of the statute. This decision was made in the context of the District Court and Court of Appeals opinions and the unaltered position of respondent (argued before the Fifth Circuit and now this Court) that the policy as applied to children attending private segregated academies was sustainable. Counsel for respondents' statement on oral argument that applications for reemployment made by petitioners at this time would only be "considered" bears out the conclusion that under the new statute a portion of the relief requested, i.e., reinstatement, would not be forthcoming. Assuming the correctness of the foregoing it may also be concluded that applications by teachers having children in private segregated schools are currently not being considered by Calhoun County officials.

(3) The claims of petitioners relating to reinstatement and back pay as well as the serious constitutional issue raised with respect to the termination of their employment obviously make this case a poor candidate for the label of "abstractly . . . intellectually interesting" of purely "academic" nature under Rice v. Sioux City Mem. Park Cemetary, Inc., 349 U.S. 70, 74. Specifically, this case presents a clear, solid constitutional issue with each party continuing to maintain diametrically opposed positions after passage of the statute in question. Even more important, a cursory reading of the Fifth Circuit opinions rendered by Judges Coleman and Roney reveal that, in addition to dealing with the specific issue of public school teachers with children attending private schools, work from a constitutional premise that all school board regulations meeting a "reasonableness" standard outweigh the incurred loss of protected constitutional rights. In this context, the issue raised transcends events leading to petitioners' termination. As stated by Judge Clark in dissent below:

> Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. The problem is that the decisional principle it establishes applies to all forms of personal association from the Ku Klux Klan to Black Panthers, and from membership in the Citizens Counsel to membership in the NAACP. Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone. [Pet. App. 28a]

The concept of Equal Justice Under Law demands that the petitioners' have their case decided on the merits. This Court's responsibility to the Constitution and this country requires no less.

Respectfully submitted,

George Colvin Cochran

George Colvin Cochran
Attorney for Petitioners

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IN THE

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OCTOBER TERM, 1976

No. 75-503

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Education Association ("NEA") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amicus curiae, suggesting that certiorari was improvidently granted but urging that if the Court reaches the merits the decision below should be reversed.[1]

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[1] Pursuant to Rule 42(2) of the Court's Rules, amicus has requested, but not received, the parties' consents to the filing of this brief.

The National Education Association is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or who is interested in advancing the cause of education. NEA was organized in 1857 and was chartered in 1906 by a special act of Congress. Its statutory purpose is "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States." 34 Stat. 805. NEA presently has 1.8 million members, most of whom are teachers in public educational institutions.

A major interest and objective of NEA is to secure equality of education and sound education for children of all races. It is committed to the goal of full and effective desegregation of all school systems in the country and to the attainment and maintenance by each school district of a genuine unitary system with no trace of racial discrimination. To that end, NEA has participated as amicus curiae in numerous cases involving issues of school desegregation, most recently in *Pasadena City Board of Education* v. *Spangler*, 44 U.S.L.W. 5114 (June 24, 1976).[2]

At the same time, NEA is equally committed to safeguarding the rights of teachers. In furtherance of this concern, it has participated as amicus curiae in cases before this Court presenting issues concerning, *inter alia*, the rights of teachers to the substantive and due process guarantees of the First and Fourteenth Amendments.[3]

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[2] NEA also submitted amicus briefs in *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189 (1973); *School Board of the City of Richmond, Virginia* v. *State Board*, 412 U.S. 92 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

[3] See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

NEA's members thus have a substantial interest in the case at bar insofar as it involves the extent to which school authorities, properly concerned to achieve a truly unitary school system, may intrude upon the associational rights of teachers. More specifically, this case presents difficult and sensitive issues raised when a teacher-parent's fundamental right to educate his or her child in a private school, recently reaffirmed by this Court in *Runyon* v. *McCrary*, 44 U.S.L.W. 5034, 5039 (1976), is made grounds for termination by school administrators pursuant to a program of ending all vestiges of a previously segregated school system.

In light of its twin commitments to effective school desegregation and the right of teachers to be protected from unconstitutional terminations, commitments which it believes need not and should not be incompatible, NEA is vitally interested in the determination of the issues raised by this case. Further, NEA believes that it may be of service in presenting to the Court principles and guidelines by which the conflict presented in this case may be resolved.

Additionally, NEA wishes to bring before the Court the issue whether this Court should dismiss the writ of certiorari as improvidently granted. So far as we can determine, that issue will not be briefed by the parties. This case presents particularly compelling reasons to choose this course of action: in light of this Court's decision of June 24, 1976, in *Runyon* v. *McCrary*, *supra*, the stark factual circumstances presented by the case are unlikely to arise again; and a supervening state statute enacted since the commencement of the litigation will bar the question from arising again in the State of Mississippi. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Wherefore, the National Education Association requests that this Court grant leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

STATEMENT OF FACTS

The Calhoun County, Mississippi, Board of Education refused to rehire for the 1973-74 school year three teachers, Loula J. M. Adams, Billy D. Cook and Mrs. W. P. Wright, because the children of these teachers were enrolled at the private, racially segregated white Calhoun Academy. The board acted pursuant to its policy, adopted in November 1972, that:

> "[P]rior to the employment of a new teacher or the reemployment of an existing teacher the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed." (App. 9)[1]

A. The Adoption of the Policy

On August 9, 1968, the United States District Court for the Northern District of Mississippi placed the Calhoun County school system under a desegregation order (Pet. App. 30a; App. 382). In the 1969-70 school year, complete desegregation of the system was ordered (Pet. App. 31a), and by the 1970-71 school year, the school system was fully desegregated (Pet. App. 4a).

The Calhoun Academy was established as a racially segregated, white private school in August 1968 (Pet. App. 31a). Several teachers in the Calhoun County public school system sent their children to the Academy (App. 217).

Prior to the adoption of the school board policy in November 1972, the board had "fairly frequent[ly]" heard reports from parents that children "wanted to know why so-and-so was [a] teacher and her kid was in a private school" (App. 217). The school authorities considered the policy for two or three years before adopting it (App. 211, 232). In February 1972, the superintendent of the Calhoun school system, John G. Burt, proposed that the policy be adopted (App. 151). In July 1972, Roger W. Hudson, the principal of the Calhoun Attendance Center, one of the several schools in the system, on his own authority announced to the teachers there that the policy was in effect (App. 33-34). On October 9, 1972, the attorney for the school board wrote to the United States Department of Justice requesting its opinion as to the validity of the policy (App. 391-92). On November 6, 1972, the Assistant Attorney General for Civil Rights wrote a generally favorable reply to the school board, reserving, however, comment on "any 'due process' or 'First Amendment' issues" raised by the policy (App. 402-03). Later in November 1972, the board formally adopted the policy (App. 33).

[1] The decisions below are cited to the appendix in the petition for certiorari, referred to as "Pet. App. ——." References to the record are cited to the general appendix before the Court and are denominated as "App. ——."

Superintendent Burt testified that he recommended the policy "in order to comply with the court order and to carry out the job of running the best schools . . . possible" (App. 141). He stated that he felt that having a child in private school "affect[s] [a] teacher['s] . . . performance" and that "we needed total cooperation and dedication from all people concerned with the public schools" (App. 141).

Principal Hudson testified that the policy was adopted "to promote the unitary system . . . [a]nd we feel that if a teacher [has] divided loyalties that her efficiency, productivity, is not going to—is definitely going to be affected" (App. 27). Thus, Mr. Hudson "assumed" that a public school teacher's efficiency and productivity would be detrimentally affected because the teacher's child was in private school (App. 27).

The letter which counsel for the school board Paul M. Moore wrote to the Justice Department stated that the board was considering the rule because "certain of the teachers . . . have children that they are sending to private schools" (App. 392). Counsel further stated in the letter that

> "I advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their

> action was correct. The board also feels that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children." (App. 392).

Upon receipt of the Justice Department's response (App. 402), the board adopted the policy. School board president Mallory testified that the board had acted because of the establishment of the Calhoun Academy (App. 189-90, 215). Mr. Mallory testified that the board "didn't think" that a teacher who had children in the Calhoun Academy "would be dedicated to the public school system" (App. 199-200). He said, "[I]f the teacher has got a kid in one school they are bound to have, you know, some loyalty to that school. And we just—it was our opinion that they wouldn't be as fully dedicated to the school system" (App. 215).

Mr. Mallory further testified that "people that have kids in the private schools, especially at the time of the organization, were hard prejudiced against the public schools. . . . Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought." (App. 201). He also testified that "it's hard to believe, now, for me personally to believe that all of the prejudice that these people have is gone, you know, completely enough that they could dedicate theirselves to the public school system." (App. 203). Finally, he testified that "[t]here has got to be just a little friction, you might say, or animosity between some of these people, you know, that teach at these—that have kids in the private school and public schools, in my opinion" (App. 211).

B. Application of the Policy

The board policy was applied to the teachers by their principal, Mr. Hudson. Mr. Hudson testified that he understood the policy to apply to all private schools (App. 26, 39). He testified that the policy was a "blanket policy" that applied to "everyone, black or white," "rich, poor," "yellow, green," and that he had faithfully carried out the policy "in every instance" (App. 18-19). The rule was "absolute and inviolate" (App. 25), and it "didn't matter if [the children] were not mentally alert or had some defect in hearing" (App. 25) or if the teacher wanted to send his children to a "parochial" school (App. 25-26). The policy was still "applicable" (App. 26). Thus, the principal had notified two black teachers whose child was not enrolled in the Calhoun County schools that the policy applied to them. The teachers retained their jobs only by showing that their child did not live with them and was in the public school system in Atlanta, Georgia (App. 19-20).[2]

When the school board adopted the policy, eight teachers had their children in the Calhoun Academy (App. 217). Five removed their children, but petitioners Adams, Cook and Wright did not.

Each of the petitioners was conceded to be a qualified teacher (Pet. App. 33a). Each had taught for at least four years prior to his or her dismissal (App. 12, 13, 14), and the board had never received any complaints about

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[2] There was discussion in the record about application of the policy to Mr. Hamblin, a teacher at the Calhoun Attendance Center. His children had been in the Magnolia School for the Deaf for the 1972-73 school year. It appeared that the policy did not affect him for that year because that school, which had "access to state funds," was considered a public school (App. 157). Mr. Hamblin transferred his children to the Calhoun Academy for the 1973-74 school year (App. 157-58), and, when Superintendent Burt found this out, he told Mr. Hamblin that he would "not be reemployed" if his children remained at the Calhoun Academy (App. 156).

the petitioners' teaching being affected by their children's attendance at private school (App. 227). Similarly, Mr. Mallory, the board's president, had never heard any of the petitioners say anything derogatory about the public school system (App. 231). The record is likewise devoid of any evidence indicating that these teachers had had any racial difficulties with the black children in their charge.

The teachers were terminated for the sole reason that they had sent their children to the Calhoun Academy (App. 237). At the district court hearing, the teachers each stated several innocuous reasons for sending their children to the Academy, but the credibility of their testimony was substantially undermined on cross-examination.

C. Defense of the Rule

The school board defended the validity of the rule in the district court largely on the basis of the testimony of the school board president, school superintendent, school principal, and school board counsel, summarized above, and the testimony of two expert witnesses, Dr. Francis Eicke and Dr. Grady Harlan. Both Dr. Eicke and Dr. Harlan testified, in substance, that any public school teacher who sent his children to any private school detrimentally affected the public school system.

Dr. Eicke was Assistant Professor of Guidance and Educational Psychology at the University of Mississippi (App. 98). He testified that a "teacher sending children to a private school would be evidencing a rejection of the public school system" and that the "students would perceive this rejection and as a result would react to the teacher in a different kind of way than if they perceived the teacher as totally committed to the education system" (App. 100). He also testified that a "teacher that rejects the public school system as acceptable for their own children would set lower expectations" for public school

children, although "not [as] a conscious kind of thing," and "if a teacher expected less from students th[en] the students would tend to perform at a lower level . . ." (App. 101-02). On cross-examination, Dr. Eicke expressed the view that "every teacher who is being paid by the State of Mississippi owes an obligation to send his or her child to a public school" (App. 109), and that "every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her child to a public school" (App. 109-10). He further testified, however, that there might be legitimate exceptions to a prohibition barring public school teachers from sending their children to private school and, therefore, that a school system's policy "should not be a blanket policy but that each case should be taken on its individual merits and decided on those merits" (App. 113).

Dr. Harlan was Professor and Chairman of the Department of Guidance and Educational Psychology at the University of Mississippi. Dr. Harlan testified that teacher expectations affect learning (App. 125-27) and that, if a public school teacher sent his child to private school,

> "that would set up a system where other students would perceive or could perceive the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend" (App. 123).

Dr. Harlan further testified that

> "if the student is perceiving the teacher as negative and that it is not a viable place for your own children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, probably would not achieve as well" (App. 124).

As to the policy in question, his "opinion would be that if the entire teaching staff is committed to furthering the public education in that county, then the students have a better chance of being successful, achieving" (App. 125). Dr. Harlan also testified that, even for a teacher who sent his children to private schools, he "wouldn't have an opinion on any particular teacher [but] would have to talk to the specific teacher on that" (App. 127). On cross-examination, Dr. Harlan testified that he had made an examination of one school in the county where he had "been attempting to increase the interaction between the school and the community and the student and the teacher in public schools," and his testimony was based in part on his observations at that school (App. 129). He had, however, not spoken to any students at that, or apparently any, school to see what effect the policy would have on them (App. 136-37). Dr. Harlan testified that it was his opinion "that you should support public education if you are a public school employee" (App. 130). He testified that if a teacher taught at a state university, he should send his child to the public schools (App. 132), and that if a public school teacher wanted to send his children to parochial school, the teacher "should make a decision about whether or not" he wanted to continue working in the public schools (App. 133-34).

D. The District Court Opinion

The district court upheld the validity of the terminations. The court found that the petitioners were "otherwise qualified to continue their teaching duties" (Pet. App. 33a), and that the "sole reason" for the board's refusal to reemploy them was their refusal to comply with the board policy (*id.*). The court recognized that "literally" the board's policy applied to all private schools, but stated that the "undisputed proof shows that the school board, the plaintiffs and the local community understood that the regulation was adopted, and has been applied, only as to public school teachers who patronize" the Calhoun Academy (Pet. App. 37a). Thus, the court did not consider the policy in terms of other private schools, stating that "[s]ince private schools of that nature are not attended by plaintiffs' children, they cut no figure in this case" (Pet. App. 37a).

The court upheld the terminations because it concluded that the rule was an "appropriate measure" to eliminate racial discrimination from the public schools" (Pet. App. 38a). The court stated that it "accept[ed]" the expert testimony that the "policy was significantly related to a teacher's effectiveness and job performance" (Pet. App. 38a). The court said, "[S]tudents in desegregated classes are likely to perceive rejection, and experience a sense of inferiority, from a teacher whose own children attend a nearby racially segregated school, and be inclined to perform at a lower educational level" (Pet. App. 38a). The court stated that "an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools" (Pet. App. 39a).

The court found "as a fact" that the "dominant, if not sole, reason why each [petitioner] enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system" (Pet. App. 34a). The court concluded that the "board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools" (Pet. App. 39a).

E. The Court of Appeals Opinions

The court of appeals affirmed the district court by a 2-1 vote, splitting three ways and writing three opinions. In a statement of facts agreed upon by each of the judges on the panel, the court of appeals approved the narrowing construction given the policy by the district court, stating that the "approach of reviewing the policy narrowly as it was intended and applied, rather than broadly as it was adopted, has the pragmatic virtue of facing up to the real issue between the parties and producing a resolution of that issue on its merits now" (Pet. App. 5a).

Judge Coleman voted to affirm the district court's decision because he saw the board's policy as an attempt to "promote the unity of, and public confidence in, the public school system" (Pet. App. 12a), and concluded that it fell within the "general, discretionary power of school boards to manage public schools" (Pet. App. 12a). Thus, he determined that the parental rights asserted by the teachers had to give way to the "considered judgment of the school board" (Pet. App. 11a). Judge Coleman saw "no necessity to put a 'desegregation' gloss on the decision" (Pet. App. 12a).

Judge Roney also found the policy acceptable, but only on the "particular facts" of the case and he did "not get to the question of the validity of the general policy unrelated to this specific case of court-ordered desegregation" (Pet. App. 13a-14a). He stated that "it would have been preferable for the school board to treat each plaintiff individually," but found that the "district court had a sufficient base to apply the general evidence to the individuals" (Pet. App. 13a-14a). He concluded that, in the particular circumstances, the "school authorities acted within their discretionary authority" (Pet. App. 13a).

Judge Clark dissented, stating that the board was impinging on a fundamental constitutional right of the

teachers; that to do so, it had to narrowly tailor the means chosen to effectuate its ends; and that it had not done so here since no determination had been made of the "unfitness" of the particular teachers not reemployed (Pet. App. 15a-16a, 20a). He stated that there had been no showing that the teachers' sending of their children to the Calhoun Academy had caused any "material and substantial disruption" of the teachers' performance of their duties, and he concluded that the board's failure to make such a showing caused the terminations to be unconstitutional (Pet. App. 27a-28a).

A petition for rehearing was denied, five judges noting their dissent. (Pet. App. 1a).

SUMMARY OF ARGUMENT

1. The writ of certiorari should be dismissed as improvidently granted. The particular factual circumstances of this case are unlikely to arise again. After *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976), private academies are unlikely to continue a self-proclaimed policy of segregation; school boards are unlikely to have occasion to adopt rules like that at issue here; and, if such a policy were adopted, the inferences to be drawn from a teacher's enrollment of his child at a private school within the purview of the policy would be more ambiguous. Furthermore, a state statute passed after the commencement of this litigation bars the question from arising again in the State of Mississippi. Under these circumstances, the difficult constitutional questions raised herein should be left until a more representative case appears. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

2. Should the Court reach the merits, the judgment below should be reversed.

(a) That parents have a constitutional right to educate their children in private schools, rather than the public schools provided by the state, is well established by the decisions of this Court. *E.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). This constitutional right of association is not lost because the particular private school chosen teaches and represents offensive racist beliefs, or because the school may operate in violation of 42 U.S.C. § 1981.

(b) (1) A school board may penalize a teacher's assertion of his constitutional rights only if that assertion will materially and substantially disrupt or pose a substantial threat of materially disrupting the educational process. A school board's forecast that a teacher's activities pose a substantial threat of material disruption must be based on concrete facts. *Tinker* v. *Des Moines Independent Comm. School District*, 393 U.S. 503 (1969); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). (2) Even in asserting the state's substantial interest in preventing material disruption or substantial threat of material disruption to the educational process, a school board must minimize infringement upon a teacher's constitutional rights. (3) A school board cannot, pursuant to a general rule, penalize a teacher's mere association with an unpopular private group unless it can show that such association will cause substantial harm to the state's interest in each case covered by the rule.

(c) (1) The board's policy—even when limited to the racially segregated Calhoun Academy—sweeps too broadly. The policy unconstitutionally penalizes the teachers solely because of their association with the Calhoun Academy occasioned by the enrollment of their children there. (2) The board's policy as applied to these teachers is unconstitutional because there were no facts in the record showing that the teachers had materially disrupted

or posed a substantial threat of material disruption to the educational process in the Calhoun County public schools.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

This case presents substantial and difficult questions of constitutional law, raising a potential conflict between the First Amendment's guarantee of freedom of association and the Fourteenth Amendment's requirement that public schools be free of all aspects of racial segregation. There are compelling reasons why this Court should choose not to face those questions in the present context and instead dismiss the writ of certiorari as improvidently granted.

In light of this Court's decision in *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976), the stark factual circumstances of this case are unlikely to arise again. In *Runyon*, this Court held that white, segregated academies violated 42 U.S.C. § 1981 by refusing to contract with black parents for the education of black children. The *Runyon* holding should go far toward eliminating self-proclaimed segregation on the part of white academies. The effect will be to make more ambiguous the inference to be drawn from a teacher's sending his child to private school. There doubtless still will be situations in which a board concludes that a teacher's actions outside the school will undermine his students' ability to learn inside the school. But whatever the context that might again bring to this Court the question whether a school board may rely on a teacher's outside activities as a basis for a decision against reemployment, that context will not be the enrollment of the teacher's offspring in a private school with a lawful policy of excluding black students.

Moreover, it was the presence and operation of such a self-proclaimed, segregated white academy in Calhoun County that apparently led the Calhoun County School Board to adopt the rule at issue in this case. The decision in *Runyon* making unlawful the operation of such academies makes even more speculative the possibility that any school board would adopt such a rule in the future.

In Mississippi itself, where the Calhoun Academy is located, a like case should not arise again. Since the initiation of this suit the Mississippi State Legislature passed a statute which bars school boards from refusing to reemploy teachers and other school personnel solely on the ground that they had sent their children to private school. Miss. Code Ann § 37-9-59 (March 27, 1974). The statute provides:

> "The governing authorities of every school district in this state are hereby prohibited from denying employment or reemployment to any person as a superintendent, principal or teacher . . . or as a noninstructional personnel . . . for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, teacher, or noninstructional personnel is employed."

There is no indication in the record that the statute has retroactive effect. However, the passage of the statute should prevent the present set of facts from arising again in the State where this suit arose.

The appropriateness of dismissing the writ as improvidently granted in this case is demonstrated by the Court's decision in *Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955). There, the Court dismissed a writ as improvidently granted because of a state statute enacted after the commencement of the

litigation which barred the question presented from ever arising again in that State.

In *Rice*, plaintiff contested the constitutionality of an Iowa decision which permitted cemeteries to deny burial to non-caucasians. The case came to the Court in the immediate wake of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and presented complicated issues of "state action" as well as the issue whether the Fourteenth Amendment condemned the practice complained of. Initially, the Court affirmed the Iowa Supreme Court's decision by an equally divided vote. On petition for reconsideration, however, the Court focused for the first time on a supervening Iowa statute which, while not applicable to the parties at bar, substantially diminished the public importance of the case. Paying special heed to the "Court's duty to avoid decision of a constitutional issue unless avoidance becomes evasion" and the impact of the supervening law, the Court determined to vacate its judgment and dismiss the writ as improvidently granted. 349 U.S. at 74. In response to the contention that the case presented questions of special importance to the parties, the Court said:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true when the issues involved reach constitutional dimensions . . . ." 349 U.S. at 74.

The case now before the Court presents reasons at least as compelling as those in *Rice* for the Court to dismiss the writ as improvidently granted. As we have demonstrated, the particular factual circumstances pre-

sented by the case are unlikely to arise again because of *Runyon*, and, just as in *Rice*, a supervening state statute enacted since the commencement of the litigation will bar the question from arising again in the State of Mississippi. Thus, though the petition presents questions which are "intellectually interesting and solid," those questions would be better decided in a case of more general significance. The writ should be dismissed as improvidently granted.[3]

II. IF THE WRIT OF CERTIORARI IS NOT DISMISSED, THE JUDGMENT BELOW SHOULD BE REVERSED

The Calhoun County School Board refused to reemploy the petitioner teachers solely because the teachers had sent their children to the Calhoun Academy (App. 227). We show herein that the Board's action was unconstitutional because it impermissibly presumed, without adequate basis, that the teachers' association with the Calhoun Academy through the exercise of their constitutional right to send their children to private school posed a substantial threat to the educational process. We discuss, first, the nature and derivation of the teachers' constitutional right at stake; second, the appropriate method to resolve the conflict between that right and the board's interest in eliminating the vestiges of a dual school system; and, third, the reasons why the board's rule is unconstitutional, both as construed below and as applied.

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[3] See also *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting): Among the considerations traditionally guiding the Court in determining whether to deny a writ of certiorari are (1) that the issue presented is "too moribund for adjudication" and (2) that the question whether the issue presented is likely to be of general significance had "better await the perspective of time."

A. The Teachers Had a Constitutional Right To Send Their Children to Calhoun Academy

The teachers' right to send their children to Calhoun Academy derives from fundamental constitutional sources including the First Amendment right of association. The constitutional magnitude of the decision to enroll their children at the Calhoun Academy is no less substantial because Calhoun Academy is a racially segregated, private school. Only last term, this Court explicitly acknowledged that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions." *Runyon* v. *McCrary*, 44 U.S.L.W. 5034, 5039 (June 25, 1976).

The substantiality of the constitutional right of a parent to choose to educate his child in a private school, rather than the public school provided by the State, has long been attested to by this Court. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Only recently, the Court said that the "State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Norwood* v. *Harrison*, 413 U.S. 455, 461-62 (1972). Accord, *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1971). On numerous occasions, the right has been deemed "fundamental" and "implicit in the concept of ordered liberty" protected by the Constitution. *E.g.*, *Cleveland Board of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 65 (1973); *Roe* v. *Wade*, 410 U.S. 113, 153 (1972); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). Indeed, this Court has said, "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction

from public teachers only." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

The teachers' choice of the Calhoun Academy as the school for their children does not materially diminish the substantiality of the constitutional interest they assert. *Runyon* v. *McCrary*, *supra*, 44 U.S.L.W. at 5039. The First Amendment protects the right of the Academy's patrons to join together to advance their beliefs, however offensive those beliefs may be to most Americans. As this Court has said, "The freedom to associate applies to the beliefs we share, and to those we consider reprehensible." *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974). Thus, the "State . . . may not restrict speech or association because it finds the views expressed by any group to be abhorrent." *Healy* v. *James*, 408 U.S. 169, 187-88 (1972). Rather, the "freedoms . . . guaranteed by the First Amendment must be accorded the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Id.* at 188. Accordingly, Calhoun Academy's blatant racism does not affect the teachers' constitutional right to send their children there.

Moreover, even if the Academy had refused to contract with black parents in violation of 42 U.S.C. § 1981,[4] the Academy's unlawful action would not negate the constitutional right of the teachers to send their children to the Academy. The Court in *Runyon* distinguished between the parent's right to send their children to any particular private school, which was acknowledged to be of constitutional stature, and a private school's practice of refusing to contract with black parents, which was held to be prohibited by Section 1981. In the instant case, the record indicates that the parents are asserting

[4] The record shows that a Calhoun Academy official testified that the Academy would have refused to contract with black parents, but that no black parents had sought to enroll their children at the Academy (App. 72).

only the constitutional right to send their children to a private school, not the right to insist that the school be or remain racially segregated. Neither *Runyon* nor any decision of this Court has held that an individual's freedom of association is lost simply because the organization with which he is associated has engaged in activities prohibited by law. For example, it has never been suggested that union members forfeit their constitutional right to belong to their union because the union has been found to have violated Title VII of the Civil Rights Act of 1964.[5] See *Elfbrandt* v. *Russell*, 384 U.S. 11, 15 (1965), and *Scales* v. *United States*, 367 U.S. 203, 229 (1961), disapproving "blanket prohibition[s] of association with a group having both legal and illegal aims."

In sum, the teachers had a constitutional right to send their children to the Calhoun Academy.

B. A School Board Cannot Terminate a Teacher's Employment Pursuant to a General Rule Which Bars Mere Association Unless It Can Show That in Every Case Violation of the Rule Will Materially Harm or Substantially Threaten Such Harm to the Educational Process

The magnitude of the teachers' constitutional interests in the case is substantial. See Part A *supra*. Similarly substantial, however, is the State interest asserted in opposition—the constitutional duty of a school board to eliminate all vestiges of a segregated school system. *Swann* v. *Board of Education*, 402 U.S. 1, 15 (1971); *Green* v. *County School Board*, 391 U.S. 430, 437-38 (1968). The legitimacy of the board's refusal to reemploy the teachers in the instant case turns on the resolution of the conflict between the teachers' individual

[5] The permissible inferences that may be drawn from an individual's association with an organization are further discussed in Part II(B)(3), *infra*.

constitutional interests and the state's compelling goals. In such circumstance, the mode of resolution becomes crucial.

Accordingly, in this section of our brief we discuss what conditions justify governmental infringement of individual rights in order to promote the educational process. We begin with this Court's requirement that an individual's constitutional rights may be infringed only if the exercise of those rights poses a "substantial threat of material disruption" to the work of the school. *Healy* v. *James*, 408 U.S. 169, 189 (1972); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). We show that any such threat must be predicated upon concrete facts. *Healy* v. *James*, *supra*; *Tinker* v. *Des Moines School Dist.*, *supra*. Next, we consider the principle established by this Court that even in promoting its legitimate interest in the educational process, government may not unnecessarily infringe upon constitutional rights, but instead must narrowly tailor its methods to further only its legitimate ends. *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). Finally, we conclude with the Court's rule that the state cannot, pursuant to a general rule, penalize an employee for mere association with an organization, regardless of the degree and nature of his involvement, unless it can be demonstrated that harm or substantial threat of harm to the state's legitimate interests will eventually flow from such association in each and every case. *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

1. *A School Board Can Limit the Exercise of Teachers' Constitutional Rights Only If Concrete Facts Exist Warranting the Conclusion That the Exercise of These Rights Will Cause Material and Substantial Disruption or Create a Threat of Material and Substantial Disruption to the Educational Process*

a. *Teachers' Constitutional Rights Can Be Limited Only If Their Exercise Materially and Substantially Disrupts or Poses a Substantial Threat of Material Disruption to the Educational Process*

The initial standard that the board's policy must meet is the rule, well established by decisions of this Court, that First Amendment freedoms may not be limited by the state in the educational context absent a showing of "material and substantial disruption" or a "substantial threat of material disruption" to the educational process. *Healy* v. *James*, 408 U.S. 169, 189 (1972); *Grayned* v. *City of Rockford*, 408 U.S. 104, 117-19 (1972); *Tinker* v. *Des Moines Independent Comm. School District*, 393 U.S. 503 (1969). See *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The verbal formula of this rule has developed largely in the context of student assertions of constitutional rights, but both analysis and precedent demonstrate that the same standard should govern teachers' assertions of their constitutional rights.

Initially, it should be beyond dispute that a school board cannot impose whatever restrictions it wishes upon its teachers' exercise of their constitutional rights. "It is much too late to argue," this Court has said, "that the State may impose upon the teachers in its schools any conditions it chooses, however restrictive they may be of constitutional guarantees." *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968). Accord, *e.g.*, *Perry* v. *Sindermann*,

408 U.S. 593, 597 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605 (1967).

Rather, as this Court has recognized, a school board's ability to limit its teachers' exercise of their constitutional rights arises only because of the teacher's relationship to the educational process and the state's legitimate interest in "promoting the efficiency" of that process. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (state cannot inquire into all teacher associations since "[m]any such relationships could have no possible bearing upon a teacher's occupational competence or fitness"). So long as "material disruption of the educational process" is understood to mean that school boards need not tolerate teacher conduct that interferes with the efficient operation of the public schools, the "material and substantial disruption" standard seems appropriate to apply in the teacher context. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947) (upholding prohibition of public employees' political activities which "interfere with the efficiency of the public service"); *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) (same).

The lower courts have widely applied the "material and substantial disruption" standard to measure whether a school board may legitimately limit a teacher's assertion of his First Amendment rights.[6] Similarly, in the

[6] Second Circuit: *James* v. *Board of Education*, 461 F.2d 566, *cert. denied*, 409 U.S. 1042 (1972) (First Amendment protects teacher's wearing antiwar armband; mere fear of disturbance does not justify restriction); *Russo* v. *Central School District*, 469 F.2d 623, 632 (1972), *cert. denied*, 411 U.S. 932 (1973) (teacher may not be dismissed for refusing to pledge allegiance to flag, "where there has been no interference with the requirements of appropriate discipline in the operation of the school"); Third Circuit: *Roseman* v. *Indiana University of Pennsylvania*, 520 F.2d 1364 (1975) (teacher's potentially disruptive intramural speech not protected by

single case that this Court has decided concerning a teacher's dismissal because of the alleged impact of the assertion of his constitutional rights on the educational process, this Court held the firing unconstitutional because the teacher's statements, which were critical of the board of education, were "neither shown nor can be presumed to have in any way either impeded the teach-

First Amendment); Fourth Circuit: *Acanfora* v. *Board of Education*, 491 F.2d 498, 501, *cert. denied*, 419 U.S. 836 (1974) (no evidence that "interviews [on homosexuality] disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results" would follow); Fifth Circuit: *Fluker* v. *Alabama State Board of Education*, 441 F.2d 201, 206 (1971) (state has burden of showing that teacher's activities "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); Sixth Circuit: *Whitsel* v. *Southeast Local School District*, 484 F.2d 1222 (1973) (teacher's incitement of students not protected under *Pickering* and *Tinker* standards); Seventh Circuit: *Hostrop* v. *Board of Jr. College Dist. No. 515*, 471 F.2d 488, 492 (1972) ("It has been consistently held that a government cannot punish a person for his speech alone, but only for speech that causes substantial disruption or that hinders the functioning of the state"); *Clark* v. *Holmes*, 474 F.2d 928, 931 (1972) (First Amendment does not protect "uncontrolled expression . . . internally destructive of the proper functioning of the institution"); Eighth Circuit: *Gieringer* v. *Center School Dist.*, 477 F.2d 1164, *cert. denied*, 414 U.S. 832 (1973) (no ground for dismissal absent a showing of disruption of the teacher's classroom duties or the regular operation of the school); *Birdwell* v. *Hazelwood School Dist.*, 491 F.2d 490 (1974); Ninth Circuit: *Adamian* v. *Jacobsen*, 523 F.2d 929, 934 (1975) ("only where expressive behavior 'involves substantial disorder or invasion of the rights of others' may it be regulated by the state"); Tenth Circuit: *Rampey* v. *Allen*, 501 F.2d 1090, 1198 (1974), *cert. denied*, 420 U.S. 908 (1975) (no evidence that teachers' conduct constituted any threat to operation of the college); *Bertot* v. *School Dist. No. 1*, 522 F.2d 1171, 1183 (1975) ("undifferentiated fear" of "degeneration" inadequate to justify infringement of First Amendment rights; no showing that actions impeded teacher's proper performance of classroom duties or interfered with operation of school); *Smith* v. *Losee*, 485 F.2d 334, 339 (1973), *cert. denied*, 417 U.S. 908 (1974) (defendant Board must "assume the burden of showing that the plaintiff's acts materially and substantially interfered with the requirements of appropriate discipline in the operation of the school").

er's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering* v. *Board of Education*, 391 U.S. 563, 572-73 (1968).

The validity of this rule—that the school board may penalize a teacher for exercising First Amendment rights only where that exercise has caused or poses a substantial threat of causing material disruption to the educational process—derives from established constitutional analysis. This Court has long held that when the exercise of individual constitutional rights conflicts with the attainment of government's desired goals, the government must give way unless the interest it advances is of substantial importance. *Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973) ("significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest"). Thus, government action which "touch[es] . . . protected rights" can bar only that " 'specific conduct as constitut[es] a clear and present danger to a substantial interest of the State.' " *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966), quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1939).

Material disruption of the educational process implicates substantial government interests and, accordingly, has been held to legitimize government limitation of First Amendment rights. "Associational activities need not be tolerated when they infringe reasonable [school] rules, interrupt classes, or substantially interfere with the opportunity of . . . students to obtain an education." *Healy* v. *James*, *supra*, 408 U.S. at 189.

The legitimacy of government restraint of "substantial threats" of material disruption to the educational process is similarly well-established. There is obviously little virtue in a rule which requires the state to stand impotent while watching imminent injury become present

harm. Thus, while this Court has held that a state official's "undifferentiated fear or apprehension of disturbance is not enough to overcome" exercise of First Amendment rights, *Tinker* v. *Des Moines Independent Comm. School District*, 393 U.S. 503, 508 (1969), it has also held that government can restrain in advance individual actions presenting a high likelihood of harm to significant government interests or, in the words of the cases in the educational context, posing a "substantial threat of material disruption" to the educational process. *Healy* v. *James*, *supra*, 408 U.S. at 189.

As the foregoing discussion discloses, in the instant case, the Calhoun County educational authorities could legitimately refuse to reemploy teachers with children enrolled at the Calhoun Academy only if their employment would either have materially disrupted, or posed a substantial threat of material disruption to, the educational process.

b. *A School Board's Forecast of a Substantial Threat of Material Disruption to the Educational Process Must Be Based on Concrete Facts*

While, as we have indicated, a school board can bar or penalize constitutionally-protected conduct which it anticipates will pose a substantial threat of material disruption to the educational process, this Court has established that a board can act on the basis of such a prediction only if it has before it "facts which might reasonably have led [it] to forecast substantial disruption of or material interference with school activities." *Tinker* v. *Des Moines Indep. Comm. School Dist.*, 393 U.S. at 514. Numerous lower courts have applied this standard to First Amendment activities in the educational context. The Second Circuit has stated, for example, that limitations on the exercise of a teacher's constitutional rights

"can be justified only by a conclusion, based on reasonable inferences flowing from concrete facts and not abstractions, that the interests of . . . sound education are materially and substantially jeopardized." *James* v. *Board of Educ.*, 461 F.2d 566, 571 (2d Cir. 1972). Other courts of appeals have held to the same effect. *Bertot* v. *School District No. 1*, 522 F.2d 1171, 1183 (10th Cir. 1975); *Acanfora* v. *Board of Educ.*, 491 F.2d 498, 501 (4th Cir. 1974); *Shanley* v. *Northeast Indep. School District*, 462 F.2d 960, 970-71 (5th Cir. 1972); *Quarterman* v. *Byrd*, 453 F.2d 54, 59 (4th Cir. 1971); *Scoville* v. *Board of Education*, 425 F.2d 10, 13-15 (7th Cir. 1970); *Norton* v. *Discipline Comm.*, 419 F.2d 195, 199 (6th Cir. 1970).

While these cases involve protected speech, this Court has explicitly held that government can limit associational activities which pose a substantial threat to the educational process only if the prediction that such harm will occur is "factually supported by the record," *Healy* v. *James*, 408 U.S. at 188.

2. *Government Must Minimize Unnecessary Infringement of Constitutional Rights*

The second standard that the board's policy must meet is the rule that, even if the state is promoting an interest which is substantial, the means utilized by the state to achieve its goal must be narrowly tailored to that end. This Court has said:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The cases to the same effect are legion, and the principle—that "[p]recision of regulation must be the touchstone" when the state seeks to limit fundamental constitutional rights—seems authoritatively established and beyond dispute. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Accord, *e.g.*, *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972); *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964). See also *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) ("The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty in support of their legitimate goals.").

In the instant case, accordingly, even though the state may legitimately rid its schools of racist influences, it may do so only in a way that minimizes infringement of constitutional rights.

3. *The Government Must Make an Individualized Showing of Harm Where It Seeks To Penalize Mere Association*

The third standard that the board's policy must meet is the principle that the State cannot penalize an employee, pursuant to a general rule, for mere association with a group, unless it can establish, in each case, that such association in fact poses the threat of harm upon which the rule is based. The point is illustrated by *United States* v. *Robel*, 389 U.S. 258 (1967), when the Court held unconstitutional a statute barring any member of the Communist Party regardless of the quality and degree of memberhip, from being employed at a defense facility. The vice perceived by the Court was that "[t]he statute quite literally establishes guilt by association alone, without any need to establish that the individual's association poses the threat feared by the Government in proscribing it." *Id.* at 265.

A different standard may obtain where a general rule is adopted prohibiting more active conduct of government employees that is reasonably considered to pose, as a general matter, a substantial threat of harm to the efficiency of the service. Thus, in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld a statute barring federal employees from taking "an *active* part in . . . political campaigns," 413 U.S. at 550 (emphasis added), even though the Court presumed that not every employee's associational activities would interfere with the efficiency of the public service.

This distinction is supported by a long line of decisions in which the "Court has consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization." *Healy* v. *James*, 408 U.S. 169, 185-86 (1972); *United States* v. *Robel*, 389 U.S. 258 (1967). The government cannot presume harm from the mere fact of association, but must look to whether the association is active or passive and whether the individual has merely joined the association or has joined with a specific intent to further the unlawful aims of the group. *E.g.*, *Healy* v. *James*, 408 U.S. 169 (1972); *United States* v. *Robel*, *supra*, 389 U.S. at 262; *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

C. The Board's Refusal to Reemploy Petitioners Violated Their Constitutional Rights

1. *The Policy Is Invalid on Its Face Because It Impermissibly Presumes That Any Teacher Whose Child Is Enrolled in the Calhoun Academy Poses a Substantial Threat of Material Disruption to the Educational Process*

The rule pursuant to which petitioners were discharged—even limited as applicable only to teachers with children in Calhoun Academy—is unconstitutional on its face. The rule bars the employment and reemployment of public school teachers who do not remove their children from Calhoun Academy and place them in the public schools, thus impinging substantially upon the constitutional rights of such teachers. As demonstrated above, see pp. 21-27 *supra*, the rule therefore can be justified only if it is narrowly drawn to prevent material and substantial disruption, or a substantial threat of material disruption, to the educational process. In fact, however, the rule was drawn as a broad, prophylactic measure impermissibly presuming that a teacher's association with the Calhoun Academy, without regard to the nature and degree of that association, poses a substantial threat of material disruption to the educational process in the public schools.

The plain words of the board's rule demonstrate that the rule is not narrowly tailored to serve the state's substantial interest in eliminating all vestiges of the dual school system from the public schools without unnecessarily infringing on the teachers' constitutional rights. The rule bars from employment all teachers who have children in Calhoun Academy, not just teachers who are "active" supporters of the Academy and its racial policies. Under the cases, a rule barring the latter class of teachers from employment in the public schools might be justified if the school board could demonstrate that as

a general matter a teacher's active involvement with a racially segregated institution reasonably might be expected to carry over into, and substantially disrupt, the operation of the public schools. The board's rule contains no such limitation, however, indiscriminately barring both teachers actively involved in fostering the Academy's racial philosophy and teachers passively involved with the Academy and affiliated only to the extent of sending their children there.

The simple fact of his child's enrollment in the Calhoun Academy is not sufficient to mark a teacher as an active supporter of the racial views or practices advanced by the Academy. The child could be enrolled in the Academy for a reason having little to do with the racial views of his parent, as, for example, where the parent is deferring to legitimate medical advice, acquiescing in a spouse's decision, or simply agreeing to the child's own wishes. None of these reasons would unambiguously mark the parent as an active supporter of the Academy or its unlawful policy of excluding black students.

Since the rule does not distinguish between active supporters and passive patrons of an organization, the rule can only be defended on the ground that all teachers with children in the Calhoun Academy pose a substantial threat of material disruption of the county's public schools. The evidence in the record does not support a conclusion, however, that in each and every case the mere presence of a teacher's child at the Calhoun Academy would substantially disrupt or threaten substantially to disrupt the educational process.

The testimony of neither of the expert witnesses presented by the board justified the prophylactic approach which the board adopted in its rule. The experts each testified that a teacher with his own children in private school might set lower expectations for public school children that would cause such children to "*tend* to perform at a lower level" (App. 102), so that they "*probably* would not achieve as well" (App. 124). The experts also testified that "a teacher sending [his] children to a private school would be evidencing rejection of the public school system . . . and students would perceive this rejection" and that this would undermine the educational process (App. 100; see also App. 123-24).[7]

However, the experts expressed uncertainty as to whether these effects would apply in every case. Indeed, they testified that the board's policy should *not* be applied in a prophylactic fashion. Thus, Dr. Eicke testified that a policy like the Calhoun policy "should not be a blanket policy but that each case should be taken on its individual merits and decided on those merits" (App. 113). Likewise, Dr. Harlan testified that he "wouldn't have an opinion on any particular teacher [but] would have to talk to the specific teacher on that" (App. 127). If even the board's experts would have had to talk to a particular teacher to determine his effect on the educational process and if they would not have adopted a blanket policy like that of the board, the board can hardly find support for its rule from their testimony.

A similar infirmity lies in the trial judge's determination that "an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and distrust in de-

[7] We have grave difficulty with the "rejection" concept as a justification for a restriction on the exercise of a teacher's First Amendment rights. For example, were a teacher to write a letter to a newspaper criticizing inadequacies in his public school, surely the potential that students in that school might feel rejected would not be a sufficient ground for his termination. *Pickering* v. *Board of Education, supra,* 391 U.S. at 572 ("Teachers are members of a community most likely to have informed and definite opinions [on] . . . the operation[s] of the schools . . . . Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

segregated schools" (Pet. App. 39a). The trial court's conclusion was based upon this Court's statement in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), that "The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests by its own actions that its educational processes are based on private belief that segregation is desirable in education." (Pet. App. 39a). This statement, however, in no way establishes the attitude of every parent of a child in such a school. Thus, as one of the board's expert witnesses acknowledged, there may be circumstances in which a parent elects to send his child to such a school not because of its policy of racial segregation but because it has special facilities which do not exist in the public schools (App. 112). And, as discussed *supra*, p. 30, such an election may be motivated by other considerations equally independent of the policy of racial segregation.

Additional alleged support for the rule came from the members of the Calhoun County school administration who believed that the rule was an appropriate measure designed to eliminate all vestiges of the dual school system. We do not challenge the good faith nature of that belief. The cases are clear, however, that a school administration cannot infringe the constitutional rights of its teachers simply because it believes it is justified in doing so. See pp. 21-26. Rather, a school board can limit a teacher's exercise of his constitutional rights only by showing that that exercise materially disrupted or posed a substantial threat of materially disrupting the educational process. The testimony of the school administration witnesses was devoted largely to the circumstances surrounding the adoption of the board policy, and respondents simply did not attempt to prove that teachers who had their children in the Calhoun Academy in fact caused, or posed a substantial threat of causing, harm to the educational process.

To be sure, Mr. Mallory referred to "complaints" he had received from parents regarding teachers who had their children in the Calhoun Academy. There was no showing in the record, however, that the complaints concerned a failure of the educational process, or that the parents believed that their children would learn less well because teachers had enrolled their own children at the Calhoun Academy. Similarly, Mr. Mallory testified that "people that have kids in private schools . . . were hard prejudiced against the public schools" and "some of that is going to carry through for those teachers that have kids [at Calhoun Academy]" (App. 201). Again, there was no showing in the record that the racial prejudice in fact had "carr[ied] through" to the teachers. The presumption that Mr. Mallory made, based solely on the teachers' association with Calhoun Academy, is precisely the kind of presumption that this Court has repeatedly held unconstitutional. *United States* v. *Robel*, *supra*. Finally, Mr. Mallory testified that "there has just got to be a little friction" between teachers with their children at the Academy and those with children in public schools (App. 211). Again, there was no showing in the record that any such friction actually had occurred, even though the board had several years since the opening of the Calhoun Academy to observe whether it would be created.

A word should be said about the trial court's conclusion that the policy in question was justified as a means of insuring that the desegregated public schools—facing the possibility of white flight to the "segregation academy" and needing community support—had the "undivided loyalty" of their teachers (Pet. App. 38a). Encroachments on a teacher's First Amendment right, however, cannot be based upon an asserted requirement of undivided allegiance to the school system. In *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), this Court held unconstitutional the dismissal of a teacher for exercising a First Amendment right to criticize the school board not-

withstanding the board's contention that the teacher owed a "duty of loyalty" to support the public school system.

In sum, the board's rule lacked evidentiary support. Instead the rule operated on a presumption long discredited by this Court that any degree of involvement with an undesirable organization justifies the infringement by a school board of an individual teacher's constitutional rights. *United States* v. *Robel, supra; Healy* v. *James, supra.* Since the board's rule is unconstitutional on its face, the board's refusal to rehire the petitioners, based solely on the rule, should also be struck down as unconstitutional.

Petitioners should, of course, be allowed to assert this facial invalidity of the rule. In *Young* v. *American Mini Theatres*, 44 U.S.L.W. 4999, 5002 (June 24, 1976), this Court ruled that governmental regulations might be attacked on their face if their deterrent effect on legitimate First Amendment rights was " 'both real and substantial' " and if the regulation was not " 'readily subject to a narrowing construction by the state courts,' " quoting *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1974). Here, the board policy is not readily susceptible of any further limiting construction[8]; both the district court and the court of appeals have already construed the policy to apply only to teachers with children in Calhoun Academy, a construction far more narrow that the literal terms of the policy (and, indeed, perhaps more narrow than warranted by the record). Likewise, the deterrent effect of the statute is real and substantial; the record discloses that five teachers other than petitioners have already been "induced" not to exercise their

[8] The board policy might be construed, contrary to its plain terms, to include an "active intent" requirement. Any such construction would require a reversal of the decisions below because no finding was made that the petitioners had actively promoted the aims of the Calhoun Academy.

constitutional right to send their children to the Calhoun Academy (App. 217).

In sum, petitioners may appropriately challenge the board's policy on its face, and, on its face, the policy is unconstitutional.

2. *The Rule Was Unconstitutional As Applied to Petitioners Because the Board Made No Showing That the Teachers Had Materially Disrupted or Posed a Substantial Threat of Material Disruption to the Educational Process*

Even apart from the general validity of the board's policy, its application to bar reemployment of the teachers in this case was unconstitutional because the record is devoid of any evidence showing that any one of these teachers had caused material and substantial disruption to the educational process or posed a substantial threat to the educational process. Indeed, the record is devoid of any evidence as to the impact caused by these particular teachers. Thus, while the goal pursued by the school board—eliminating the vestiges of a dual school system from the public schools—is indeed substantial, the board was not justified in refusing to reemploy the teachers without a showing that the teachers' exercise of their constitutional rights had caused or would cause the harm the board sought to eliminate.

The board made no attempt to show that these teachers had in fact caused material and substantial harm to the educational process. All the evidence was to the contrary. The teachers were competent. They had each taught in the Calhoun public schools for several years after the schools were integrated and while their own children were in the Calhoun Academy. There was no evidence in the record that any complaints had been received regarding their performance. They would have been rehired by the board except for the adoption of the policy.

There is accordingly no basis in the record on which to conclude that the teachers had in fact had any detrimental effect on the educational process.

There likewise is no basis on which to conclude that the teachers posed a substantial threat to the educational process. The teachers' past history of competent performance substantially belied that accusation, and no other evidence in the record supported it. Certainly, the testimony of the expert witnesses did not. Rather, as noted above, each of the experts testified that before he could predict a teacher's impact on the educational process, he would have to speak to the teacher.

The experts did testify that they believed that every teacher in the state system "owes an obligation to send his or her children to public school" (App. 109, 132), and, indeed, Dr. Eicke even testified that "every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her children to a public school" (App. 109-10). The experts' personal beliefs in a teacher's "obligation" to the school system do not amount to evidence that a teacher who does not comply with this "obligation" poses a substantial threat to the system. Indeed, the experts made no such claim, stating, as noted above, that a prediction as to a teacher's impact on the educational system could be ventured only after an evaluation of the particular teacher. The board made no such evaluations of the petitioner teachers, however, instead refusing to reemploy them solely because their children were enrolled at the Calhoun Academy.

In sum, there was no evidence in the record showing that the teachers posed a substantial threat of material disruption to the educational process. This Court has held, however, that a school board can penalize the assertion of First Amendment rights for such a reason only if there are concrete facts in the record to support the action. See pp. 25-26, *supra*. In the absence of such a showing—or of a showing, absent here, that the teachers had in fact disrupted the educational process—the teachers could not constitutionally be refused reemployment for exercising their constitutional right to send their children to the Calhoun Academy.

CONCLUSION

For the foregoing reasons we urge that the writ of certiorari be dismissed as improvidently granted. Alternatively, if the Court determines to reach the merits, we urge that the judgment of the court of appeals be reversed.

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